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MICHIGAN WORKMEN'S COMPENSATION CASES

INCLUDING

RULES OF PROCEDURE
FORMS AND BLANKS

JULY 1916

PUBLISHED BY INDUSTRIAL ACCIDENT BOARD

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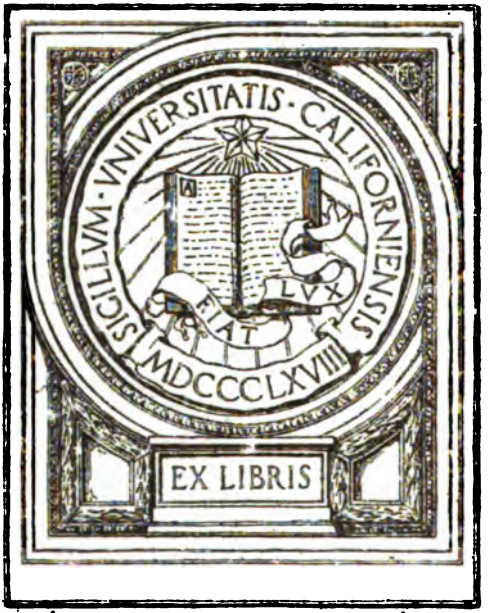

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WORKMEN'S COMPENSATION CASES

Determined By

INDUSTRIAL ACCIDENT BOARD

AND

SUPREME COURT

Also Administration and Practice,
Rules of Procedure,
Forms and Blanks.

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INTRODUCTION.

This Report of Workmen's Compensation Cases and Rulings has been prepared and published by the Michigan Industrial Accident Board as an aid in the understanding and administration of the law. It substantially covers the development and administration of the Compensation Law up to the date of publication, July, 1916, and contains, in addition to the formal opinions of the Board and Supreme Court, the Rules of Procedure, Rules and Practice to be followed in reporting accidents and adjusting cases, Miscellaneous Rulings, Opinions by the Attorney General, etc. The formal written opinions filed by the Board in what are considered leading cases, involving the interpretation of important features of the law, are published in full. All the decisions handed down by the Supreme Court in cases appealed from the decision of the Board are included in the report. These together with the Miscellaneous Rulings and other matter will, we think, show the system of administration and interpretation as developed to date. It is believed that the Report will furnish those interested in the administration of the law, or taking proceedings under the same, a means of information and guidance which can be easily and effectively used.

FUNDAMENTAL DECISIONS.

The constitutionality of the Michigan Law was settled in the case of *Mackin* vs. *Detroit-Timken Axle Company,* Vol. 22, Detroit Legal News, 588, the opinion being exhaustive and ably sustaining practically every feature of the law. After stating the facts in that case and before proceeding to a discussion and disposition of the legal points raised, the Court by way of introduction states the controlling principles:

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> "It is to be recognized at the outset that workmen's compensation legislation of this class, based on the economic principle of trade risk in that personal injury losses incident to industrial pursuits are like wages and breakage of machinery a part of the cost of production, works fundamental changes in the familiar principles underlying and governing the doctrine of liability for negligence as heretofore applied to the relation of master and servant. But it by no means follows that this comparatively recent and radical legislation upon the subject, enacted to meet changed industrial conditions and afford relief from evils and defects which had developed under the old rules of law in negligence cases for personal injuries of employes, violates the spirit or letter of our constitution."

The only remaining constitutional objection was that urged by the City of Detroit and the City of Sault Ste. Marie against the provision of the Michigan Act making it mandatory as to municipalities, claiming that it invaded the right of local self-government extended to cities under the constitution of the State; also that it was in conflict with the charter provisions relative to making and giving notice of claims against cities. Both of the above cases were decided against the objecting cities, the question of the constitutional right to local self-government being fully discussed and disposed of in the case of Mary Wood v. City of Detroit, and the charter question in Purdy v. City of Sault Ste. Marie. These decisions were by the Supreme Court and in both cases affirmed the position taken by the Board.

The question as to when the employer becomes subject to the Workmen's Compensation Law is decided in Bernard v. Michigan United Traction Company, Vol. 22, Detroit Legal News, 945. Under the Michigan Act, which is elective, the first step to be taken by the employer in becoming subject to its provisions, is to file with the Industrial Accident Board

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a written acceptance. The law further provides for the examination and approval of acceptances so filed, by the Board. The injury in this case occurred between the time of the filing of the acceptance and its approval. The court held that the new status created by the Compensation Law is not established until the approval of the acceptance and that the date of such approval is controlling.

OCCUPATIONAL DISEASES.

Adams v. *Acme White Lead & Color Works,* 182 Mich. 157, was a case of death from lead poisoning, the lead being gradually absorbed into applicant's system while at work in respondent's plant. The body of the Michigan Act provides for compensation in cases where the employe receives "a personal injury," while the language used in the title of the Act is "personal injury by accident." It was held by the Supreme Court that the law does not cover occupational diseases such as lead poisoning, but must be limited to personal injuries received by accident, the restrictive language in the title and other matters pointed out in the opinion being the basis for this construction.

EVIDENCE.

The Supreme Court has uniformly held that the findings and decisions of the Industrial Accident Board as to matters of fact are conclusive and not subject to review on appeal, if such findings are supported by competent evidence. The Court has also held that the Board in arbitrations and hearings before it is bound by the established rules of evidence, intimating however that such rules perhaps should not be as strictly applied as in regular court proceedings. Hearsay evidence is discussed in some of the cases and the weakness and unreliability of that class of testimony pointed out. However, the Court has distinctly held that an award is not to be reversed because incompetent or hearsay evidence was admitted at the hearing, if enough competent evidence is found to rea-

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sonably sustain the decision. The cases touching upon this subject will be readily found by referring to the index of this Report under the head of "Evidence," as will another class of cases involving the question of circumstantial evidence where there is no eye witness to the accident and no one having personal knowledge of facts upon which the decision of the case depends.

The Regents of the University of Michigan and the State Board of Agriculture are constitutional bodies not subject to Legislative control, and therefore not subject to the Compensation Law without filing an election to come under its provisions. *Agler* v. *Michigan Agricultural College,* 181 Mich. 559. The Regents of the University of Michigan have filed their acceptance of the Compensation Law and are operating under the same. No acceptance has been filed by the State Board of Agriculture. There are now in effect the acceptances of 17,000 employers of labor covering more than 700,000 workers in the State. The amounts paid for compensation to injured workers and their dependents, exclusive of medical and hospital service furnished, approximate one and a half millions of dollars yearly.

INDUSTRIAL ACCIDENT BOARD.

JOHN E. KINNANE, Chairman,
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STATE OF MICHIGAN

INDUSTRIAL ACCIDENT BOARD.

DECISIONS AND OPINIONS OF THE BOARD IN WORKMEN'S COMPENSATION CASES WITH THE DECISIONS AND OPINIONS OF THE SUPREME COURT IN ALL ADJUDGED CASES.

ARCHIBALD SCOTT,
Applicant,
vs.
WHAT CHEER COAL COMPANY,
Respondent.

HERNIA—RESULT OF ACCIDENT OR DISEASE.

Applicant was employed as driver by respondent in its coal mine. The cars driven by him ran on tracks and were frequently liable to jump off. When this occurred, it was the duty of the driver to get the car back on the track. While attempting to lift a car back onto the track, applicant suffered a strain which resulted in an inguinal hernia. He was awarded compensation for four weeks, by an arbitration committee, together with hospital and medical expenses. The question involved is, whether the hernia should be classed as an accident within the meaning of the Compensation Act.

HELD: 1. That although the strain was received while in the performance of applicant's ordinary work, it was the result of an extraordinary exertion and therefore should be classed as an accident within the meaning of the Act.

2. That before the workman is entitled to compensation in

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case of hernia, it must be shown to have the essentials of an accidental injury, and it must arise out of the work, as from a strain or some other occurence. Hernia occurring without any strain and without the elements that are necessary to constitute an accident would not come within the meaning of the law.

Appeal of What Cheer Coal Company from the decision of an arbitration committee awarding compensation to Archibald Scott for an injury sustained by him while in respondent's employ. At the hearing of this cause on review a general invitation was extended to all interested in the subject of hernia to participate in such hearing and file briefs. The case was exhaustively argued and a large number of able briefs filed, the purpose of the general hearing being to consider and determine the status of hernia cases under the Workmen's Compensation Law. It was contended on behalf of respondent that hernia should be classed as an accident only in a few rare cases.

Opinion by the Board:

The applicant, Archibald Scott, was employed as a driver by respondent in its coal mine, and as such it was his duty to drive trains of coal cars drawn by mules through the various passages and entries of the mine, the cars running on an iron track. It was quite a common occurrence for one or more of such cars to jump the track, and in such case it was the duty of the driver to get the car back on to the track and proceed with his trip. Each of the empty cars weighed about one thousand pounds. On March 23, 1914, while the applicant was so employed, one of the cars left the track and became wedged in between the transfer rail and the straight rail of the track. Applicant attempted to lift the car back on to the track and while so doing felt a strain in the abdomen. It pained him for a few minutes and then seemed to go away. That night when changing his clothes at the wash shanty he noticed a small swelling, which turned out to be an inguinal hernia. He went back to work on the following day, which was Tuesday, and continued working until Friday night when

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he went to a doctor for an examination. The last two days that he worked it distressed him considerably. On Saturday he reported the matter to the company and on the following day submitted to an operation which was successful and resulted in a complete cure. The arbitration committee awarded the applicant compensation for four weeks, together with hospital and medical expenses. The applicant testified that he noticed the pain directly at the time he was lifting on the car while trying to replace it on the track, that he examined himself when he went to the wash-house that evening and found the swelling, and that it increased in size during the three or four days following until he went to a doctor. He further testified that in replacing a car on the track it was necessary to lift with all his might. That prior to lifting on the day in question there was no swelling or appearance of hernia.

At the time of rehearing of this case, a general invitation was given to those interested in the general subject of hernia to participate in the rehearing and to file briefs. The case was exhaustively argued and a number of able briefs filed, the purpose of the general hearing being to consider and determine in a general way the status of hernia cases under the Workmen's Compensation Law.

It is contended that putting derailed cars back upon the track is a part of the ordinary work of a driver, and that a hernia resulting from the applicant's ordinary work is not an accident within the meaning of the law. It is also contended that inguinal hernia in a large majority of cases is not the result of accident, but comes from bodily weakness which is usually congenital. These claims were strenuously urged and have been given careful consideration and investigation by the Board.

In the opinion of the Board it is fairly shown that the applicant, while exerting himself to replace the car upon the track, sustained a strain which produced the hernia; that he was not subjected to any external violence; and that the hernia was brought on by lifting on the car, something which

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he was frequently required to do in the course of his work. We do not think the mere fact that the strain was received in performing his ordinary work makes the occurrence any less an accident. Almost the precise question was under consideration in the case of Clover, Clayton & Company vs. Hughes, by the House of Lords, 3 B. W. C. C. 275, the date of the decision being March 14, 1910. The alleged accident in that case was the rupture of an aneurism while the employe was engaged in doing his ordinary work, and it was contended that because nothing unusual happened in connection with his work that it was not an accident within the meaning of the British Workmen's Compensation Law. We quote from the prevailing opinions in the above case:

"I do not think that we should attach any importance to the fact that there was no strain or exertion out of the ordinary. * * * * If the degree of exertion beyond what is usual had to be considered in these cases, there must be some standard of exertion, varying in every trade. Nor do I think we should attach any importance to the fact that this man's health was as described. If the state of his health had to be considered, there must be some standard of health, varying, I suppose, with men of different ages. An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of health."

Again we quote from opinion on page 280:

"Certainly it was an 'untoward event.' It was not designed. It was unexpected in what seems to me the relevant sense, namely, that a sensible man who knew the nature of the work would not have expected it. I cannot agree with the argument presented to your Lordships that you are to ask whether a doctor acquainted with the man's condition would have expected it. Were that the right view then it would not be an accident if a man very liable to fainting fits fell in a faint from a ladder and hurt himself. No doubt the ordinary accident is associated with something external; the bursting of a boiler, or an explosion in a mine, for example. But it may be merely from the man's own miscalculation, such as tripping and falling. Or it may be due both to internal and external conditions, as if a seaman were to faint in the rigging and tumble into the sea. I think it may also be something going wrong within the human frame itself, such

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as the straining of a muscle, or the breaking of a blood vessel. If that occurred when he was lifting a weight it would be properly described as an accident."

Again we quote from the opinion on pages 283 and 284:

"The man 'broke part of his body,' to borrow Lord Robertson's expression in *Brintons v. Turvey*, 7 W. C. C. 1. And he certainly did not mean to do it. * * * * The fact that the man's condition predisposed him to such an accident seems to me to be immaterial. The work was ordinary work; but it was too heavy for him. * * * * The fact that the result would have been expected, or indeed contemplated as a certainty, by a medical man of ordinary skill if he had diagnosed the case, is, I think, nothing to the purpose. An occurrence, I think, is unexpected, if it is not expected by the man who suffers by it."

In Fenton vs. J. Thorley & Co. Ltd. 5 W. C. C. (the same being a House of Lords case), it is said on page 4:

"If a man, in lifting a weight or trying to move something not easily moved, were to strain a muscle, or rick his back, or rupture himself, the mishap in ordinary parlance would be described as an accident. Anybody would say that the man had met with an accident in lifting a weight, or trying to move something too heavy for him."

Bradbury in his work on Workmen's Compensation, Page 367, Vol. I, Second Edition, stated the general rule as follows:

"Rupture caused by overexertion in the course of a man's work is an accident within the meaning of the Compensation Act."

Citing a large number of English and American Authorities.

The same general rule is laid down in Boyd's Workmen's Compensation on Page 1043. It has also been adopted by the United States Government in the administration of the Compensation Law applicable to government employes, the principle being stated as follows:

"A person whose duty requires him to lift heavy weights may, in so doing, overstrain himself and cause a rupture. Even though the rupture be due, in some degree, to the naturally feeble condition of the employee, he would, without doubt, be entitled to the benefits of

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the act." See Opinions of Solicitor for Department of Commerce and Labor, Page 151.

We do not overlook the medical evidence introduced on the hearing to the effect that hernia should be classed as an accident only in a few rare cases. We think that the weight of authority in workmen's compensation cases is clearly against such theory, and that the general rule established in the adjudicated cases and the text books is otherwise. The Board is of the opinion that there are many cases of hernia which occur under such circumstances that they could not be considered the result of accident. But we think it would be neither possible nor practicable to enumerate such conditions, as each case would have to depend upon its own peculiar facts and circumstances, and these may vary as widely as the field of human experience, depending upon things that could not be reasonably foreseen or predetermined by rule.

It seems clear that before the workman is entitled to compensation in case of hernia, it must be shown to have the essentials of an accidental injury, and it must arise out of the work, as from a strain or some other occurrence. Hernia occurring without any strain and without the elements that are necessary to constitute an accident would not come within the meaning of the law.

The award of the committee on arbitration is affirmed.

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HUGH SHAFER,
Applicant,
vs.
PARKE, DAVIS & COMPANY,
Respondent.

FARM LABORERS—SUFFICIENT NOTICE.

Respondent drug company maintained a farm for the purpose of raising horses, guinea pigs, etc., which are used for the purpose of obtaining anti-toxins, serums, and vaccines. Applicant, while employed on this farm, was kicked in the thigh by a horse and received an injury resulting in a permanent partial disability. Compensation was denied on the ground that farm laborers do not come within the benefits of the act, and that applicant failed to give notice of his injury within the required time.

HELD: 1. That the Act does not exclude farmers from accepting the provisions of the law, but exempts them from its operation merely in the sense that they suffer no harm by not coming under it.

2. The work carried on at respondent's farm was in reality a part of its general manufacturing business.

3. The fact that the injury was reported to the farm superintendent within a few days, and claim was made for compensation in a letter to the company within the time required by law, was sufficient notice of applicant's claim.

Appeal of Hugh Shafer from the decision of an arbitration committee denying compensation for injuries received while applicant was working on a farm owned by Parke, Davis & Company. Decision reversed and compensation ordered paid.

Opinion by the Board:

Parke, Davis & Company, the respondent, is a corporation organized under the laws of the State of Michigan, its character and scope being set forth in the articles of incorporation as follows:

"The purpose or purposes of this corporation are as follows: The

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manufacture and sale of chemicals and pharmaceuticals; the propagation and sale of serums, vaccines, toxins, anti-toxins, and biological and bacteriological products generally; the printing, publication and sale of medicinal and pharmaceutical pamphlets, books and magazines, and all business incident to such manufacture, propagation, printing, publication and sale."

The business in which respondent is actually engaged under its corporate charter is set forth in some detail in its brief filed in this case, as follows:

"Incidental to the manufacture and sale of said chemicals and pharmaceuticals, respondent is extensively engaged in the business of manufacturing machines, glass ware, boxes, cartons, display cards, etc. Respondent also maintains a large printing plant, garage, fire department, biological laboratory, medicinal research department, experimental department, auditing department, law department, and, last but not least, a farm."

The so-called farm of respondent consists of a tract of land near Rochester, Michigan, where about 40 hands are employed. On this farm are kept from 200 to 300 horses, about 2,500 guinea pigs, 10 cows, and a considerable number of rabbits and other animals.

The principal output of the farm consists of toxins, anti-toxins, serums and vaccines produced from the animals aforesaid by inoculation, treatments and sundry processes. These were mainly shipped to the Detroit plant of the company, which is a large manufacturing and commercial plant, employing over 2,000 men, where they are prepared for market and sent out to the trade as part of the regular business of the company.

The applicant was injured while working on this farm, so-called, by a kick from a horse which fractured the neck of the left femur, resulting in what apparently is permanent partial disability. Part of his work on the farm was taking care of the horses, preparing them for operations and assisting the operator. The ten buildings on the farm included an operating room and a laboratory. Crops were raised on the land,

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consisting of grain and hay, the same being used generally in feeding and caring for the animals.

Its acceptance of the Workmen's Compensation Law was filed by respondent on August 31, 1912, and approved by the Board on September 12th of the same year, the same being the usual unconditional acceptance of the provisions of the Act. It is contended that applicant was working for respondent at the time of the injury as a farm laborer and that the Law, together with election of respondent to come under it, did not include respondent's farm laborers within its benefits. It is further contended that applicant failed to give notice of injury and to make claim for compensation within the times required by the Act, and for these reasons must be denied compensation.

The only reference to farm laborers in the Act is found in Section 2 of Part I, and is merely a declaration that Section 1, which repeals the special defenses, shall not apply to actions for the recovery of damages by farm laborers. This does not exclude farmers from coming under the Law, but exempts them from its operation merely in the sense that they suffer no harm from not coming under it. The farmer may come under the Law by filing his acceptance if he so desires, and if such acceptance is unconditional his employes would be entitled to compensation in case of injury the same as if he were engaged in manufacturing, mining, or any other business. The contention that he may, if he choose, file an acceptance for the benefit of only a part of his men, because exempt from the provisions of the Law in the above sense, would not change the situation even if sustained, for the reason that the acceptance of the respondent in this case is unconditional and does not assume to exclude any of its employes. Also for the further reason that a manufacturing and commercial corporation such as respondent could not well be classed as a farmer.

Respondent's claim must fail for another reason. The work carried on at the so-called farm constituted a part of the man-

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ufacturing business of the company. Keeping the animals and also raising grain and fodder for their support are, we think, a part of the process in the manufacture and production of serums, toxins, anti-toxins and vaccines. If these animals were maintained in a part of respondent's plant in the city of Detroit, and vaccines, toxins and serums produced from them, it would be clearly considered a part of the general process of manufacture. The fact that this work was carried on at another place outside of the city, where better facilities and conditions could be obtained, does not change its character, and the further fact that the company could there grow grain and hay for the support of its animals, makes it no less a part of their business of manufacturing and marketing drugs and chemical products.

The contention that notice of the injury was not given and that claim for compensation was not made within the times required, are not sustained by the evidence. The injury was reported to Dr. Wilson, the superintendent of the farm, a few days after it occurred, and claim was made for compensation from the company by letter within the time required by Law. The fact that a formal claim on the blank of the Board was later served would not change the situation.

The decision of the committee on arbitration is reversed and compensation is awarded to the applicant.

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ASAPH HILLS,
Applicant,
vs.
OVAL WOOD DISH COMPANY
and
MICHIGAN WORKMEN'S COMPENSATION
MUTUAL INSURANCE COMPANY.
Respondents.

INJURY—REFUSAL TO HEAL WITHIN REASONABLE TIME.

Applicant, while working at an edging machine in respondent's mill, on May 13, 1914, received a severe injury to his right arm. Under an agreement with respondent he was paid compensation for the injury without objection until Dec. 17, 1914, at which time respondent filed a petition to stop compensation, claiming that the refusal of the wound to heal was the result of a venereal disease with which applicant was afflicted and that in a normally healthy man the wound should have healed within fourteen weeks.

HELD: That the Compensation Law does not make any exception for cases of injury to men whose health is impaired or below the normal standard. Neither does it except from its benefits the man who carried in his body a latent disease which in case of injury may retard or prevent recovery. It applies to every man who suffers disability from accidental injury, and does not exclude the weak or less fortunate physically.

Petition of Oval Wood Dish Company to be relieved from payment of further compensation to Asaph Hills, on the grounds that applicant's present condition is due to a disease other than his injury. Petition denied.

Opinion by the Board:

The applicant was a laborer in the saw-mill of the Oval Wood Dish Company of Traverse City, and on May 13, 1914, was injured by having his right arm caught in the gear of an edger. The part of the arm injured was above the elbow. The

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flesh was bruised and torn, and the front part of the arm denuded of its skin, exposing the blood vessels and muscles underneath. On June 8, 1914, an agreement in regard to compensation was made providing for the payment of compensation at $5.25 per week during the period of disability, and the same was approved by the Board. The injury did not respond readily to treatment, was stubborn in healing, and the applicant has been continuously disabled since the time of the accident, and the disability still continues, although there has been some improvement in the arm.

On December 17, 1914, respondents filed a petition to stop compensation, claiming that applicant's disability was due to a venereal disease and not to the injury. This petition was denied, and on March 1, 1915, respondents again filed a petition with the Board asking to be relieved from further liability to pay compensation for the reason that a wound such as applicant received should be completely healed within 14 weeks from the time said wound was received, that number of weeks being the maximum time for such a wound to heal; and that the continuance of the disability beyond said time was due to a diseased condition of applicant's body, and that such disease is the cause of the wound refusing to heal within approximately 14 weeks. In other words, that the period of time during which compensation is to be paid should be fixed by the estimate of physicians as to the time in which a normal person should recover from such an injury, rather than the fact that the disability continued and the injured man did not so recover.

The evidence in this case does not suggest any active disease in applicant's body prior to the injury, nor does it disclose any substantial evidence of the existence of a bodily disease except the fact that the wound did not readily heal and that symptoms led the physicians to suspect syphilis in the blood, together with some evidence that a Wasserman Test of the blood was had and that such test showed the presence of syphilis. In this connection it should be said that the essential part of the evidence as to the Wasserman Test is

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hearsay, as it consisted merely of an unsworn report sent by mail from the Lincoln-Gardner Laboratories in Chicago, where a sample of applicant's blood had been sent to be tested.

The legal question presented by the petition is an important one. If the correct rule for determining the length of time compensation for disability should be paid in case of an injury of this general character is found to be the one contended for by respondents, the result will be far-reaching. The question then to be determined in cases of continuing disability would be whether the injury *should have* healed, or whether it should have healed *more quickly* that it did, instead of the actual resulting disability. Instead of the plain question of fact as to the nature and duration of the disability which the injured man actually suffered, it would present for decision the question as to how much he should have suffered, and how soon he should have recovered, upon the theory that only a part of the disability was due to the injury and the remaining part due to disease. In the opinion of the Board, the respondent's contention must fail. The Compensation Law does not fix any standard of physical health, nor does it make any exceptions for cases of injuries to men whose health is impaired, or below the normal standard. Neither does it except from the benefits of the Law the man who carries in his body a latent disease which, in case of injury, may retard or prevent recovery. The Law by its expressed terms applies to every man who suffers disability from injury. It does not exclude the weak nor the less fortunate physically, but was intended for the working men of the state generally, taken as they are.

The authorities seem to be strongly against respondents' contention:

Boyd's Workmen's Compensation, Sec. 463.
Bradbury's Workmen's Compensation, 2d Ed. 385 and 386.
Willoughby vs. Great Western Railway Company, 6 W. C. C. 28.
Ystradowen Colliery vs. Griffiths, 2 B. W. C. C. 359.

This is not a case where the workman was suffering from some active disease or injury at the time of the accident, as applicant was apparently in good health in every respect up

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to the time he received the injury. The difficulties of proving the reasonable duration of disability which should result from an accident is discussed to some extent in the English cases above cited, pointing out the fact that Ward vs. London and Northwestern Railway Company, 3 W. C. C. 193, which attempted to make such determination, is no longer regarded as authority. They further suggest the danger of attempting to fix the duration of disability on medical prognosis and opinion evidence, when it is conceded by the medical profession itself that it has yet much to learn in such matters.

The petition of respondents is dismissed.

A. M. WORDEN,
Applicant,
vs.
COMMONWEALTH POWER COMPANY,
Respondent.

SLIPPING ON ICE—INJURY NOT ARISING OUT OF EMPLOYMENT.

The applicant was employed by the Commonwealth Power Company to repair and change its lights in the city of Jackson. He used his own horse and wagon in doing the work, keeping the horse in a barn on his own premises, and being paid for his services and that of his horse and wagon the sum of $70 per month. On the date of the injury, applicant had finished his dinner and started for the barn to hitch up his horse and complete his circuit of lights which it was his duty to care for daily, he having no special hours of employment but a certain circuit to cover each day. At a point about half way between the house and barn he slipped and fell on some ice and sustained serious and permanent injuries.

HELD: That slipping and falling on ice is one of the most common risks to which the public is exposed, and is encountered by people

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generally irrespective of their employment, and that the accident under the facts in this case did not arise out of the employment.

Application of A. M. Worden to the Industrial Accident Board for compensation for injuries claimed to have been received while in the employ of the Commonwealth Power Company. Application denied.

Opinion by the Board:

The applicant claims compensation in this case for an injury received by slipping and falling on some ice on his own premises, the ice in question being situated about half way between his house and barn. He was employed by respondent repairing and changing lights in its lighting system in the city of Jackson, and in doing this work he used his own horse and wagon, which were kept on his own premises in the barn in question. He received $70 per month for his work, and for the use of his horse and wagon, and had been engaged in this work for respondent for many years. He was 71 years of age at the time of the accident. The sole question in this case is one of law, the facts being undisputed.

On the day of the accident, the applicant had finished his dinner and started to go from his house to the barn for the purpose of hitching up his horse to go out and complete the circuit of lights in the city which it was his duty to care for daily. At a point about half way between the house and barn he slipped and fell upon some ice, which had accumulated, and sustained serious injury. Did this injury arise in the course of his employment? This question brings us very near to the border line of doubt. It is contended that going from the house to the barn in this case should be governed by the same rule that is applied to a workman going from his house to the shop or place of his employment, and that applicant's employment did not commence until he reached the barn. Also, the fact that the distance between the house and barn in this case was small does not materially change the situation, as the principle would be the same if the barn was

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situated in the next block, or several blocks away from applicant's house. On the other hand, it is contended that the applicant had no stated hours of labor; that he had a certain circuit of lights to care for each day, and was in the service of his employer throughout the day until such duties were completed, and that eating his dinner and feeding his horse were mere incidents of such employment.

The more serious question in the case is, did the accident arise out of applicant's employment? Under the language of the statute, two conditions must be present to entitle the injured man to compensation, viz., the injury must have happened "in the course of his employment," and it must also "arise out of his employment." The fact that it occurred in the course of the employment merely, if it be a fact, is not enough to entitle him to compensation. It must also appear that the injury "arose out of the employment," and was from a risk reasonably incident to such employment, as distinguished from risks to which the general public is exposed. To illustrate: Falling from his wagon, or receiving an electric shock, would constitute injuries arising from the risks incident to the employment. Many other examples might be given. These would be risks to which he was peculiarly exposed by his employment. On the other hand, it may be fairly said that one of the most common risks, to which the general public is exposed is that of slipping and falling upon the ice. This risk is encountered by people generally, irrespective of their employment, particularly so when the accident happens to the party injured while he is walking on his own premises. It is the opinion of the board that when a man is injured, as in this case, by falling on the ice in his own yard, such injury does not arise out of the peculiar character of his employment, but from a condition and danger that is common to all. It follows from this that applicant's claim for compensation must be denied. It is therefore unnecessary to decide the other question in the case, as to whether the injury arose in the course of the employment.

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EDWARD F. LARDIE,
Applicant,

vs.

GRAND RAPIDS SHOW CASE COMPANY,
and
FURNITURE MUTUAL INSURANCE COMPANY,
Respondents.

COMPENSATION FOR LOSS OF USE OF MEMBER, WHERE MEMBER IS NOT AMPUTATED.

Applicant was injured while in the employ of respondent by his hand coming in contact with a saw with the result that his little finger was completely severed, his third finger rendered permanently stiff and the first joint of the index finger likewise became permanently stiff. Compensation was paid for the loss of the little finger, but refused as to the injury to the other two fingers, under a dispute as to whether applicant was entitled to it under the act (Sec. 10 Part II, Workmen's Compensation Law).

HELD: 1. That the loss of the use of a member is sufficient to entitle the injured party to compensation as provided in the Act, whether the member is completely severed or not, the action of the surgeon in amputating the finger, or failing to amputate it, not being controlling.

2. The fact that a workman, after suffering the loss of one or more fingers, is able to earn the same wage does not affect his right to the specific indemnity provided in Section 10, Part II of the Law, such indemnity being given because the workman must go through the remainder of his life without the use of the members so lost.

Appeal of Edward F. Lardie to the Industrial Accident Board to determine his right to compensation for the permanent loss of use of two fingers. Applicant awarded compensation as provided by the statute.

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Opinion by the Board:

The applicant while in the employ of the Grand Rapids Show Case Company met with an accident by which his right hand was cut on a saw, the little finger being cut off and the first and third fingers permanently injured. The injury to the third finger resulted in its becoming permanently stiff through the destruction of the cord of control, and the injury to the first finger also resulted in permanent stiffness at the first joint from the same cause. The case comes before the Board on written stipulation of facts, and while the stipulation does not describe the injury to the fingers with entire clearness, it was conceded on the argument that the injury to the third finger rendered it permanently useless, and that the injury to the first finger rendered the last joint of the same permanently useless. No part of either the third or first finger was severed from the hand. Compensation was paid for the little finger was was severed, and the matter in dispute here is whether the applicant is entitled to compensation for the loss of the third and first fingers under Section 10, Part II of the Workmen's Compensation Law providing special indemnity for the loss of fingers and similar members. The stipulation shows that the applicant is now receiving the same or better wages than at the time of the injury.

Under the stipulated and conceded facts in the case the entire third finger has been rendered permanently useless by the accident, and the last joint of the first finger has also been rendered permanently useless. In other words the applicant has lost entirely the use of the third finger and the injury to the first finger would be equivalent to the loss of one-half of the use of the finger. If entitled to compensation under the specific schedules in Section 10, Part II of the Act, applicant would be entitled to 20 for the third finger and 17½ weeks for one-half of the first finger, the weekly rate of compensation being $7.50.

Is the loss of the use of a member equivalent to the loss of such member under the Michigan Compensation Law? The

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Board has decided this question in the affirmative, using the following language:

"The action of the surgeon in amputating a finger, or in failing to amputate it, or in choosing the point of amputation, is not controlling in all cases of this kind. The real test in such cases is whether the injured person has been permanently deprived of the use of the finger. If so, then he has suffered the loss of the finger, and the fact that the surgeon failed to remove it does not lessen his loss. If its usefulness is entirely destroyed, he has suffered the loss of the finger as completely as if it had been amputated."

The courts have uniformly construed provisions of accident policies insuring against the loss of a member, to cover cases where the usefulness of the member was destroyed by accident without resulting in severance or amputation.

1 Am. & Eng. Enc. Law, 301.
Fuller vs. Ins. Co. 122 Mich. 548; 48 L. R. A. 86;
Sneck vs. Trav. Ins. Co. 34 N. Y. Sup. 548.

In Fuller vs. Ins. Co., supra, our Supreme Court reviews the authorities bearing upon this point in considerable detail, and declares unequivocally the doctrine that the loss of the use of a member under accident insurance policies is equivalent to the loss of the member. After reviewing the authorities as above, the Court says:

"These cases establish the proposition that where an insurance policy insures against the loss of a member, the word 'loss' should be construed to mean the destruction of the usefulness of the member, or the entire member, for the purpose to which, in its normal condition, it was susceptible of application. In all these policies the word 'loss' is used, and it is the loss of the member that is in terms insured against. As indicated in the last authorities cited, the attempts of insurance companies to avoid this construction by so changing the policy that it reads, 'loss by severance,' has failed; the Courts holding, as before, that it is the loss of the use of the member which was the object of the contract."

In Sneck vs. Trav. Ins. Co. 34 N. Y. Sup. 548, the same rule has held in the state of New York. There the Court said among other things:

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"It would seem to be an extremely narrow and technical construction of this contract to say that only physical removal of every particle of that portion of the human anatomy known as the hand would entitle the injured to recover under the clause of the policy now under consideration. Is it not more reasonable and logical to conclude that in the use of the language above referred to the 'entire hand' as a part of the human structure is considered in connection with the use to which it is adapted, and the injury which the loss of such use would entail?"

The decision in Sneck vs. Travelers Ins. Co. above referred to was affirmed by the Court of Appeals in 156, N. Y. Page 669.

The language used in the Workmen's Compensation Law is "loss of finger, etc.", without any specification that such loss shall be by severance or otherwise. The purpose of the Compensation Law is to provide indemnity for the person who suffers such loss in substantially the came sense that such indemnity is provided by an accident insurance contract. We see no reason why the above construction should not be applied to the language providing for specific indemnity for the loss of a member in our law. The mere fact that the injured employe is receiving the same wages after the injury, does not alter the situation. The specific indemnities provided in Section 10, Part II of the Law are payable to the injured workman not because the injury prevents him from earning, but because he must go through the remainder of his life without the use of the member lost. A man may lose his forefinger by accident and be able to return to work in two or three weeks. Nevertheless the Law provides that he shall receive compensation for 35 weeks, because throughout the remainder of his life he will be handicapped by the loss of that finger.

We find that the applicant is entitled to 37½ weeks of additional compensation at $7.50 per week and judgment will be entered accordingly.

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ELLEN OLSON PEDERSON,
Applicant,
vs.
J. W. WELLS LUMBER COMPANY,
and
NEW ENGLAND CASUALTY COMPANY,
Respondents.

ACCIDENTAL DEATH—EVIDENCE.

Applicant's decedent was employed by the respondent lumber company at its saw mill, a part of his duties including the piling of lumber on the docks which extended from the mill out into Green Bay a distance of about 700 feet. On the date of the accident, decedent left his home for work early in the morning as usual, taking his dinner in a lunch box, which he left in the engine room of the mill where it would be kept warm, it being the custom of the employes to eat their dinners during the noon hour in and around the engine room. On the day in question while Olson was piling lumber on the dock, his fellow employe, at about 8 minutes to 12 o'clock, said "We will go to dinner" and started towards the mill leaving Olson on the lumber pile. This was the last seen of decedent until his body was recovered from Green Bay 5 months later. It was contended by respondents that the proofs fail to show that decedent met his death by accident arising out of and in the course of his employment, and that the cause and manner of his death rests wholly in conjecture.

HELD: The fact that decedent did not come to the engine room for his dinner, and that his body when found still had on the leather apron in which he worked, together with the other circumstances in the case, justified and reasonably required the inference that decedent met his death by drowning while engaged in performing the duties of his employment.

Appeal of J. W. Wells Lumber Co. et al. from the decision of an arbitration committee, awarding compensation to Ellen Olson Pederson for the death of her husband. Affirmed.

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Opinion by the Board:

On December 4, 1913, Martin Olson, the husband of applicant, was piling lumber on the docks of the respondent lumber company at Menominee, Michigan. He had been a resident of the City of Menominee for fifteen years, was in the employ of the lumber company about 3 years, and at the time of his death was receiving $1.85 per day. His family consisted of his wife, who is the applicant in this case, and one child 3 years old.

On the morning of December 4th he had breakfast at his home and left for work at 5 o'clock in the morning, taking his dinner with him, being dressed in his usual working clothes. That morning as usual he left his dinner pail in the engine room of the mill, and went out on the pier or dock of the company to his regular work of piling lumber. This lumber dock extends from the shore where the mill stands about 700 feet into Green Bay. It consists of an elevated tramway extending from the mill along the center of the docks and 18 or 20 feet above the water. The docks are on each side of the tramway and consist of timbers resting on spiles driven into the bottom of the Bay, the spaces between the timbers being from 5 to 6 feet in width. Under this tramway boards are laid down on the timbers of the dock making places to walk for the men in coming from and going to their work of piling lumber or loading boats. The lumber to be piled on the dock is brought out from the mill along the tramway in carts and unloaded by one man passing it down from the tramway to another man who builds it up in a pile on the dock timbers resting on the spiles. At the point on the dock where Mr. Olson was last seen alive the Bay is about 16 feet deep, and the timbers of the dock upon which the lumber is piled are generally a little above the water, but when the water is high they are about even with it.

On the day in question Mr. Olson was working on the dock piling lumber which was handed down to him by one Isaac Alscok, the pile on which he was working being about 2 feet

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high from the timbers of the dock. At about 8 minutes to 12 o'clock Alscok said to Olson, "We will go to dinner," and Olson said "All right." Alscok then started for dinner, going along the tramway toward the mill. After he left, Olson could not do any more work as there was no one to hand him lumber. He wore a leather apron and hand-leathers in his work.

When Olson did not appear for work in the afternoon inquiry was made, the Chief of Police was notified and he took his irons and pike pole and endeavored to find Olson's body at or near the place where he was last seen as his work, but without success. One of the hand leathers which were used by Olson was found on the timbers near where he was working. On the 4th of May, 1914, Olson's body was found washed up on the shore about 6 miles south of the mill, and when found he still had on the leather apron which he was wearing while at work on the forenoon of the day he disappeared. The waters of Green Bay freeze over in the winter, and at the break-up in the spring there are large fields of ice in the Bay which are driven by the winds, sometimes upon the shore, and sometimes in other directions. On the afternoon of the day Olson disappeared, his dinner paid was found in the engine room of the mill unopened and his lunch undisturbed. There were about 400 men working in and about the mill, mill-yards and docks, but no one could be found who had seen Olson after Alscok left him on the lumber dock about 8 minutes before noon.

Mr. Olson was about 50 years of age, was sober and industrious, owned the home which he occupied, and had $1,500 in the bank. On the day of his disappearance a lumber barge which was loading at the same dock where he was working went out that afternoon. Olson was a large man weighing about 250 pounds. The Chief of Police continued to drag the water in the vicinity of the docks for 3 or 4 days, and later procured a diver who spent the entire day searching in the water for Olson's body. It is the claim of the applicant that Mr. Olson accidentally fell from the dock and was drowned at

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or about the time that they quit work for dinner. Respondents claim that the proofs fail to show that Olson met his death by accident arising out of and in the course of his employment, and that the cause and manner of his death rests wholly in conjecture.

The issue here presented for decision is one of fact and all of the evidence is circumstantial. The lack of direct evidence, however, will not defeat applicant's claim if the facts and circumstances proved justify and reasonably require the inference that deceased met his death by drowning as he was leaving the dock for dinner. The rule applicable to this class of proof is stated in Schoepper v. Hancock Chemical Co., 113 Mich., 586, as follows:

"Defendant's counsel contend that the cause of this explosion is a matter of mere conjecture, and it is said by counsel that it is not enough for plaintiff to prove circumstances consistent with their theory, but that these circumstances, and each of them, must preclude any other rational conclusion. This we take to be but another way of stating the proposition that the proof must exclude all reasonable doubt. It is hardly necessary to say that no such rule obtains in civil cases. It is true that where an injury occurs that cannot be accounted for, and where the occasion of it rests wholly in conjecture, the case may fail for want of proof. Robinson v. Charles Wright & Co., 94 Mich., 283; Redmond v. Lumber Co., 96 Mich., 545. But such cases are rare, and that rule should never be so extended as to result in a failure of justice, or in denying an injured person a right of action where there is room for balancing the probabilities, and for drawing reasonable inferences better supported upon one side than the other."

Mr. Olson had his breakfast before 5 o'clock in the morning, was engaged in hard manual labor piling lumber until about noon, when the men started for dinner, and he would undoubtedly have gone directly from the place where he was working to the engine room of the mill for his dinner if accident had not prevented. That he did not do this is shown by the fact that his dinner pail and dinner were undisturbed and that none of the numerous employes of the company saw him around, the premises or engine room. It is scarcely disputed but that he met his death by drowning, and the fact that the

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body when found still had on the leather apron in which he worked strongly indicates that the drowning occurred when he was quitting his work at the lumber pile on the dock. These circumstances outweigh any inference that might be drawn from the failure of the Chief of Police and the diver to find his body in the vicinity of the lumber dock. We think it is shown by a fair preponderance of the evidence that Mr. Olson met his death by drowning as he was leaving or about to leave the lumber dock at noon for dinner.

The award of the committee on arbitration in favor of the applicant is affirmed.

AMBROSE DAMPS,
Applicant,
vs.
MICHIGAN CENTRAL RAILROAD COMPANY;
Respondent.

NOTICE AND CLAIM FOR INJURY—WAIVER.

Applicant Damps suffered the loss of an eye on October 3, 1912, as the result of a piece of steel flying into it, while in respondent's employ. November 25, 1912, applicant filed a report of the accident with the Industrial Accident Board. No notice of Claim for Injury was served by the applicant on respondent within the six months after the accident, but within that period such claim was filed with the Board by applicant and the Board notified respondent in writing of the filing of such claim. On May 2 and twice thereafter respondent advised the Board that it was carrying on proceedings looking to an adjustment of the claim. Applicant refused to sign the settlement papers because they were not satisfactory to him. Respondent denies liability for compensation on the ground that it was not served with notice of such claim as provided by Sec. 15, Part II of the Act.

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HELD: 1. That the filing of claim for injury with the Industrial Accident Board, and the action of the Board in communicating the fact of the making of such claim to respondent, constituted sufficient compliance with the statute.

2. That the carrying on of negotiations with applicant for the settlement of his claim as shown by the record in this case was a waiver of the right to object that claim was not made within the statutory period.

Appeal of Michigan Central Railroad Company from the decision of an arbitration committee awarding Ambrose Damps compensation for 100 weeks. Decision affirmed.

Opinion by the Board:

On October 23, 1912, Ambrose Damps, while employed in the machine shop of the Michigan Central Railroad Company at Jackson, was injured by a piece of steel flying from a wedge that he was driving, said piece of steel entering his right eye. The injury resulted in the loss of the eye. The respondent denies liability, alleging that no claim for compensation was made or filed with respondent until more than six months after the injury, contrary to the provisions of Section 15, Part II, of the Workmen's Compensation Law.

On November 25, 1912, respondent filed a report of this accident in the office of the Industrial Accident Board. On January 27th two copies of the regular blank provided by the Board for "Notice to Employer of Claim for Injury" were sent by the Board on request to applicant's attorney, together with a letter stating that both of the blanks should be filled out, and one served on the employer and the other filed with the Board. On February 21, 1913, "Notice to Employer of Claim for Injury" made by said applicant in this case on one of the blanks above referred to was received and filed in the office of the Board. It is claimed that no service of such claim for injury was ever made upon the respondent, and there is no evidence in the case tending to prove that such claim was made or served on said respondent. It is also established by the proofs that no claim was made for compensation on ac-

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count of this injury by the applicant to said respondent direct within six months from the date of the injury.

But after the filing of claim for injury in the office of the Board, a letter was written by the Board to respondent on February 25, 1913, as follows:

"We beg to advise that a claim for injury has been filed in the above named case (referring to the Ambrose Damps case). The Industrial Accident Board is interested in learning what disposition has been made of the same. Your prompt attention will be appreciated." (Signed.)

It appears further that respondent advised the Board by letter on May 2, July 9, and September 8, that it was carrying on proceedings looking to an adjustment of the claim, and on the latter date, September 8, 1913, stated that they have "sent the necessary papers to Mr. Damps for execution, and as soon as they are returned we will send you the agreement." The settlement papers referred to in the last letter were in fact sent by respondent to Mr. Damps but were not executed because not satisfactory to the applicant. It is the claim of the applicant in this case

(1). That the claim for injury filed by him with the Industrial Accident Board on February 21, 1913, and communicated in substance by the Board to respondent, was a sufficient claim for injury under the statute, and

(2). That the action of respondent in the proceedings taken by it for settlement of the claim constituted a waiver of formal notice of such claim.

After a careful consideration the Board has reached the conclusion that the action of the applicant in filing his claim against respondent for the injury in question in the office of the Industrial Accident Board, coupled with the action of the Board in communicating the fact of the making and filing of such claim to respondent, constitutes a sufficient compliance with the statute. The fundamental purpose of the provision of law referred to is to cause notice and knowledge of the fact that applicant is asserting such claim to be brought home to his employer, in order that such employer will be apprized

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of the fact that the applicant is seeking to establish such claim. This it seems was fairly accomplished by the filing of claim by the applicant and the transmission of such claim in substance to the employer through the agency of the Board. The Board is also of the opinion that the action of respondent in carrying on negotiations with the applicant for a settlement of his claim for the injury in question, through a period of several months after the expiration of six months period, constitutes a waiver of the company's right to object that formal claim for injury had not been made to it by the applicant within said six months.

The above consideration we think is in accord with the principles adopted by our Supreme Court in construing like statutory provisions. Ridgeway vs. City of Escanaba, 154 Mich. 68 and Pearll vs. City of Bay City, 174 Mich. 647. In the Escanaba case the Court said:

> "We have been inclined to favor a liberal construction of statutes requiring notice of claims, and have not denied relief when by any reasonable interpretation the notice could be said to be in substantial compliance with the statute, or where the defect had been waived by the council."

The decision of the Committee on Arbitration, which awarded the applicant 100 weeks' compensation, is affirmed.

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SAMUEL L. POSNER,
Applicant,
vs.
CONTINENTAL MOTOR MANUFACTURING COMPANY
and
MICHIGAN WORKMEN'S COMPENSATION
MUTUAL INSURANCE COMPANY,
Respondents.

NECESSARY OPERATION—OPEN AWARD.

Applicant sustained a rupture by accident arising out of and in the course of his employment. He was advised by both his own and respondent's physician to have an operation. Applicant was willing, but could not afford to pay for an operation and respondents refused to provide for it. In order to continue his employment applicant was obliged to wear a truss, which gives him only temporary relief, and unless an operation is performed he will suffer permanent partial disability.

HELD: That the Board may determine the question of respondent's liability in the case, and make an open award covering such disability as applicant may suffer on account of the injury during the statutory period for continuing disability.

Application of Samuel L. Posner for compensation and expenses incident to the performance of a necessary operation. Granted.

Opinion by the Board:

Samuel Posner, the applicant, while employed by the Continental Motor Manufacturing Company sustained a rupture while lifting an automobile crank case from the floor to a bench 32 inches in height. At the time of lifting he felt a pain in his groin, but continued to work during the remainder of the day, though troubled with the same pain. When he went home that evening he complained to his wife of being injured and following her advice consulted a physician who advised him that he needed an operation for hernia. Posner told the

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doctor that he was unable to afford the expense of an operation, and the doctor told him in that event he should wear a truss. He then reported the matter to the time-keeper of the company who gave him an order to go to Dr. Witter. He went to Doctor Witter and was again advised that he needed an operation for the hernia, and was told by the doctor that he would take the matter up with the officials of the company. A little later Posner was sent to Dr. Hutchins, the physician of the Michigan Workmen's Compensation Mutual Insurance Company. After stating his case to Dr. Hutchins, he was told to come back in a day or two and he would be advised as to what course the company would take. On his return a day or two later he was told that the company would do nothing in the matter. Posner was then ready and willing to submit to an operation, and is still ready to do so, if the company will bear the expense and pay compensation during his disability.

While the testimony in this case is conflicting, we think it is fairly shown that the applicant sustained an injury by accident, and that the accident caused the hernia from which he now suffers. After the refusal of the company to do anything for him, Posner procured a truss and went back to work at the same employment, and has earned the same wages. He has lost but very little time since the accident, but has been handicapped by the truss and his injured condition, and has continually suffered pain and inconvenience in doing his work. Unless remedied by an operation, he will continue to suffer, and disability either partial or total will probably result. The failure to have an operation is due to the action of the company, as Mr. Posner has at all times been ready and willing to undergo the operation, but was unable to provide for the expense himself, and the respondents refused to bear such expense.

The question of the form and kind of relief to be granted to the applicant is one of some difficulty. It seems that the respondents liability to furnish medical and hospital service during the first three weeks following the injury cannot be evaded in a case of this kind by refusing to furnish the same

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and to perform the duty imposed upon them by the statute. If the applicant, on the respondent's refusal to provide for an operation, had engaged a physician and hospital service and had such operation performed, the respondents would be liable to pay the reasonable cost of same. The fact that he was without means to procure such operation, though willing to undergo the same, should not effect his rights in the premises, nor should respondents be permitted to take advantage of their own wrong. However, the case still presents the difficulty of making an award for a sum of money to cover the estimated cost of a prospective operation, and the loss of time following the same.

In some of the Compensation States and in Great Britain it is the practice in cases of this kind to make what is termed an "open award," covering such disability as the applicant may suffer on account of the injury during the entire statutory period in cases of continuing disability. It seems to be clearly within the authority of the Board to make such an award in connection with its decision determining respondent's liability. The action of respondents in the case seems to have made this necessary and prevented an adjustment of the case upon a basis which would undoubtedly remove the difficulty and speedily terminate the liability.

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ZENZI SCHOENREITER,
Applicant,
vs.
QUINCY MINING COMPANY,
Respondent.

SPECIFIC INDEMNITY FOR LOSS OF MEMBER—DEATH OF EMPLOYE ADMINISTRATOR TO RECOVER.

The injury in this case resulted in the loss of the third finger for which 20 weeks' compensation was payable. No part of it was paid prior to the death of the employe which resulted from other causes than the injury.

HELD: 1. That under the facts in the case the employer is liable only for the amount of compensation which accrued to the time of the death.

2. The compensation that had actually accrued prior to the death of the employe, and had not been paid to him, became a part of his estate and as such would be collectible by his administrator.

Application of Zenzi Schoenreiter for compensation for injury to her deceased husband. Denied and remanded for future proceedings.

Opinion by the Board:

In this case Hans Schoenreiter was injured while in the employ of the Quincy Mining Company on October 20th and died on December 1st. The injury resulted in the loss of the third finger for which he was entitled to compensation for a period of 20 weeks at the rate of $7.50 per week. It is conceded that his death resulted from peritonitis which was not caused in any way by the injury. He received no compensation during his life time, but each week from the time of his injury until his death a check was drawn in his favor in the company's office, but not delivered.

The widow in her Application for Adjustment of Claim al-

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leged that the death of her husband resulted from the injury, and claimed compensation for the statutory period of 300 weeks. At the hearing before the arbitration committee this claim was abandoned, and a claim made on the part of the widow that she was entitled to the 20 weeks' compensation that her husband would have received for the finger had he lived. On the part of the respondent it is claimed that under Section 12 of Part II of the Workmen's Compensation Law that the death of Mr. Schoenreiter terminated the liability to make payments on account of the loss of the finger. It is also claimed that the widow has no right to assert a claim for the compensation that accrued prior to the death of deceased, as that belonged to him and passed under the law to his administrator. It is further claimed that the company has a right to set off certain indebtedness owing by deceased to it against this compensation that had accrued for the 6 weeks and 1 day prior to the death.

It seems clear that the employer is liable for the payment of the compensation that accrued prior to the death of deceased, which is 6 weeks and 1 day at the rate of $7.50 per week. This money accruing from week to week belonged to deceased and constituted his property as much as if the money had been actually paid over to him and deposited in a bank.

The question as to the liability of the employer for the balance of the specific period of 20 weeks for the loss of the finger in question is one of greater difficulty. The claim of counsel for applicant on this point is stated as follows:

"Where there is an injury taking off a finger, the specified compensation is due at once and is deemed to be for the period (specified in the Act). It is just the same as if a person had sued and recovered judgment and that judgment should be payable in installments and had not all been paid at the time of the death. The injury under the Act given him a vested right, and it is not necessary that he outlive this period to get the money."

But this position seems to be in conflict with Section 12, Part II of the Workmen's Compensation Law which is as follows:

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"The death of the injured employe prior to the expiration of the period within which he would receive such weekly payments shall be deemed to end such disability, and all liability for the remainder of such payments which he would have received in case he had lived shall be terminated, but the employer shall thereupon be liable for the following death benefits in lieu of any further disability indemnity:"

In the opinion of the Board it is the purpose and meaning of this provision of the Law that the right to specific indemnity in case of the loss of a member is one that is for the personal benefit of the injured man, and that it is a right peculiar to himself and not created for the benefit of his dependents. The section above quoted provides that in case of the death of the injured man, (as a result of the injury), that thereupon a right to compensation shall arise in favor of his dependents for the amount specified in the statute. We are of the opinion that the right to an order for the payments of this special compensation ceases with the death of the injured man, but that the employer is liable for the payment of the compensation that accrued prior to the death.

The compensation which had accrued prior to the death of deceased was his property as much as if it had been actually paid over to him. It was money owing to the employe at the time of his death, and it seems would stand upon the same basis as wages that he had earned and had not yet received. If we are correct in this, then the proper course would be for for the administrator of deceased to make demand for the money owing by the employer, and recover the same if necessary in a court of competent jurisdiction, where the question of a set-off claim by the employer could be litigated. While the exemption of the compensation money from garnishment and other liability to creditors may be personal to deceased, still if the estate does not exceed $150 it perhaps would be assigned to the widow without regard to the claims of creditors.

It seems that under the circumstances in this case that no award can be made to the applicant, who is the widow, the proper party to receive the money being the administrator. As

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the case now stands we can only determine the amount for which the employer is liable and leave the recovery of same to further proceedings.

MICHAEL LA VECK,
Applicant,
vs.
PARKE, DAVIS & COMPANY,
Respondent.

PARALYSIS—ACCIDENT WITHIN MEANING OF ACT.

Applicant suffered paralysis of one side of his body, caused by a cerebral hemorrhage. The evidence tended to show that such hemorrhage was the result of the rupture of a small blood vessel in the brain. The testimony tended to show that applicant was working in a room where the temperature was unusually high and that heat coupled with over-exertion was the cause of the rupture in the brain and the resulting paralysis, arterial sclerosis from which the applicant was suffering being a contributing cause.

HELD: That the facts and circumstances shown justified and reasonably required the inference that the paralysis resulted from the rupture of a blood vessel in the brain, that the same was caused by over-exertion and heat and was an accident arising out of the employment within the meaning of the Act.

Appeal of Michael LaVeck from the decision of an arbitration committee, refusing to grant him compensation for paralysis contracted while in the employ of Parke, Davis & Company. Reversed and compensation granted.

Opinion by the Board:

In this case the committee of arbitration denied applicant's claim for compensation, and applicant thereupon appealed the

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case to the full Board for review. Since the arbitration a considerable amount of additional testimony was taken, particularly medical testimony tending to show that the probable cause of the paralysis from which the applicant suffers was a cerebral hemorrhage caused by heat and over-exertion, together with a diseased condition of his arteries, known as arterial sclerosis of some two years standing.

The evidence fairly tends to show that the paralysis resulted from the rupture of a small blood vessel in the brain. We say "small" because the paralysis was gradual, being first noticed by the dropping of a flask from the hand, later on by inability to use his arm, and still later by the paralysis of one side of the body. The work which applicant was doing was making bouillon from beef by boiling and certain other processes in a room and with retorts and appliances maintained for that purpose by respondent. The weather was hot and an extra amount of bouillon was made that week, so as to have enough to meet the demands of the Plant while the apparatus was being transferred to a new room which was to be equipped for such work. A high degree of heat was required in the process, and although the retorts were so constructed as to protect the operator as far as possible from the heat and steam, a considerable quantity of both escaped into the workroom at the times of making the various changes connected with the process. No visible accident occurred, and no event causing external violence to applicant's body. It was apparently conceded on the hearing that the cause of the paralysis was in the brain, the applicant contending that it was the rupture of a cerebral blood-vessel, while the respondent contended that the paralysis resulted from the clogging of such vessel. The testimony on behalf of the applicant tended to show that on account of the condition of his arteries a cerebral hemorrhage was likely to result from the increased pressure caused by unusual heat and over-exertion, and that in the opinion of his experts such hemorrhage did occur, resulting finally in the total paralysis of one side of the body. Was

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it an accident within the meaning of the Law, and did it arise out of and in the course of applicant's employment?

Under the doctrine laid down in the "Spanner Case," so-called, and also in other and later English cases, this would be an accident. In Fenton vs. J. Thorley & Co. 5 W. C. C. 4, the question of what constitutes an accident is exhaustedly discussed, Lord MacNaghten's opinion being in subsequent cases regarded as authority and this being regarded as a leading case. Lord MacNaghten's opinion is an able discussion of the principle involved and a review of the authorities. In the opinion of Lord Robertson on Page 9 it is said: "In the present instance the man by an act of over-exertion broke the wall of his abdomen. Suppose the wheel had yielded and been broken by exactly the same act, surely the breakage would be rightly described as accidental."

In McInnes vs. Dunsmuir & Jackson, Ltd., 1 B. W. C. C. 226, it is held that where over-exertion brings on a cerebral hemorrhage and paralysis, it is an accident entitling the workman to compensation. The Court say on Page 229:

"It is the giving way of an artery causing effusion of blood on the brain, and I am unable to see any distinction between this kind of physiological injury resulting in disablement, and the kind of injury we had to consider in the case of Stewart."

On Page 230 the Court quotes from the Thorley case as follows:

"If a workman has suffered an injury by breaking a limb or by a rupture while he is trying to lift a weight too heavy for him, then, according to the ordinary use of language, one would say that that injury was caused by an accident which he met with while he was engaged at his work. I think the same rule of construction applies to the question before us, and that we should say that this man suffered from the bursting of a blood vessel while trying to lift a weight too heavy for him. That it might not have been too heavy for a man whose arteries were in a sound condition is nothing to the purpose. In the condition in which this man's arteries were he was undertaking a work which was too great for him."

In Ismay, Imrie & Company v. Williamson 1 B. W. C. C.

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232, it is held that where a seaman died from a heat stroke while raking the fire, that it was an accident entitling him to compensation. This is a House of Lords case and follows the rule laid down in the Thorley case.

In Johnson vs. S. S. "Torrington" 3 B. W. C. C. 70, it was held that where a fireman working in the hold of a vessel under great heat and drinking large quantities of water had an apoplectic stroke it was an accident within the meaning of the Compensation Law. The Court treats the principle as established and holds that the determination of the case was a question of fact.

In Hughes vs. Clover Clayton & Co. 2 B. W. C. C. 17, (The Spanner Case), the Court say:

"Every man brings some disability with him. Any exertion or any external action which might have been entirely innocuous to a man in good health may produce most serious results to the workman bringing with him, as I have said, some disability. This man brought with him a disability of a serious nature—an aneurism— which I quite agree might have caused his death at some time or other without any exertion usual or unusual. But in this case we have this fact found that a strain incurred by the workman in the ordinary discharge of his duties caused the rupture from which he died. As I read the decisions in the House of Lords, it is not open to this Court to say that this is not an accident. It is impossible, I think to read the judgment of Lord Macnaghten in *Fenton v. Thorley* * * without seeing that this case is exactly and precisely within the language which he used. But if there were any doubt about that, the more recent decision of the House of Lords of Ismay, Imrie & Co. vs. Williamson is really a much stronger case than this. In that case Lord Loreburn said: 'To my mind the weakness of the deceased which predisposed him to this form of attack is immaterial. The fact that a man who died from a heat-stroke which was by physical debility more likely than others so to suffer can have nothing to do with the question whether what befell him is to be regarded as an accident or not.' * * 'If a workman in the reasonable performance of his duties sustains a physiological injury as a result of the work he is engaged in, this is an accidental injury in the words of the statute.'"

In the case of Broforst vs. S. S. "Blomfield" VI B. W. C. C. 613, where a workman shoveling coal in the fire of a vessel had an apoplectic stroke which was found by the trial court

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to be due to the rupture of an artery in the brain which was attributed to heat and exertion; it was held that he was entitled to compensation and that the question was one of fact which the appellate court could not review.

From a careful examination of all of the facts and evidence in the case, the Board is of the opinion that the strain upon the weakened arteries of the applicant caused by over-exertion and excessive heat was more than they could stand and resulted in the rupture of a blood-vessel in the brain, which was followed by a gradual effusion of blood resulting in the gradual paralysis, and finally disabling one side of the body.

The award of the committee will be reversed and applicant granted compensation.

SUPREME COURT.

MICHAEL LA VECK,
Claimant and Appellee,
vs.
PARKE, DAVIS & COMPANY,
Respondent and Appellant.

ACCIDENT—CEREBRAL HEMORRHAGE.

Paralysis of one side of claimant's body was caused by hemorrhage resulting from the rupture of a small blood vessel in the brain. No visible accident occurred and no event causing external violence to claimant's body. He was suffering from arterial sclerosis to such an extent that cerebral hemorrhage was likely to result from increased pressure caused by unusual heat and over-exertion. Just before the occurrence he was engaged in making an unusual quantity of bouillon at respondent's plant by boiling and other processes in a room supplied with retorts and appliances for that purpose, the processes and weather resulting in a high degree of heat.

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HELD: An injury by accident within the meaning of the Workmen's Compensation Law. It was an unexpected consequence from the continued work in an excessively warm room.

Certiorari to the Industrial Accident Board to review the action of that board in awarding compensation to Michael La Veck for injuries sustained while in the employ of Parke, Davis & Company. Affirmed.

H. R. Martin, of Detroit, for claimant.
Charles M. Woodruff, of Detroit, for defendant and appellant.

MOORE, J. This is certiorari by the respondent to the Industrial Accident Board to review a finding of the Board awarding compensation to the claimant. The brief of appellant begins as follows:

"Appellant does not question the Industrial Accident Board's finding of facts, and only refers to the testimony of record to amplify the same."

It will be helpful to quote from the opinion of the Industrial Accident Board:

"In this case the committee of arbitration denied applicant's claim for compensation, and applicant thereupon appealed the case to the full board for review. Since the arbitration a considerable amount of additional testimony was taken, particularly medical testimony tending to show that the probable cause of the paralysis from which the applicant suffers was cerebral hemorrhage caused by heat and over-exertion, together with a diseased condition of his arteries, known as arterial sclerosis of some two years standing.

"The evidence fairly tends to show that the paralysis resulted from the rupture of a small blood vessel in the brain. We say 'small' because the paralysis was gradual, being first noticed by the dropping of a flask from the hand, later on by inability to use his arm, and still later, by the paralysis of one side of the body. The work which applicant was doing was making bouillon from beef by boiling and certain other processes in a room and with retorts and appliances maintained for that purpose by respondent. The weather was hot and an extra amount of bouillon was made that week, so as to have enough to meet

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the demands of the plant while the apparatus was being transferred to a new room which was to be equipped for such work. A high degree of heat was required in the process and although the retorts were so constructed as to protect the operator as far as possible from the heat and steam, a considerable quantity of both escaped into the work room at the time of making the various changes connected with the process. No visible accident occurred and no event causing external violence to applicant's body. It was apparently conceded on the hearing that the cause of the paralysis was in the brain, the applicant contending that it was the rupture of a cerebral blood vessel, while the respondent contended that the paralysis resulted from the clogging of such vessel. The testimony on behalf of the applicant tended to show that on account of the condition of his arteries a cerebral hemorrhage was likely to result from the increased pressure caused by unusual heat and over-exertion, and that in the opinion of his experts such hemorrhage did occur, resulting finally in the total paralysis of one side of the body. Was it an accident within the meaning of the law, and did it arise out of and in the course of applicant's employment?

"Under the doctrine laid down in the 'Spanner Case,' so-called, and also in other and later English cases, this would be an accident. In Fenton v. J. Thorley & Co., 5 W. C. C. P. 4, the question of what constitutes an accident is exhaustedly discussed, Lord McNaughton's opinion being in subsequent cases regarded as authority and this being regarded as a leading case. Lord McNaughton's opinion is an able discussion of the principle involved and a review of the authorities. In the opinion of Lord Robertson on page 9, it is said: 'In the present instance a man by an act of over-exertion broke the wall of his abdomen. Suppose the wheel had yielded and been broken by exactly the same act, surely the breakage would be rightly described as accidental.

"In McInnes vs. Dunsmuir-Jackson, Ltd. 1 B. W. C. C. 226, it is held that where over-exertion brings on a cerebral hemorrhage and paralysis, it is an accident entitling the workman to compensation. The court say on page 229:

"It is the giving way of an artery causing effusion of blood on the brain, and I am unable to see any distinction between this kind of physiological injury resulting in disablement, and the kind of injury we had to consider in the case of Stewart.

"On page 231 the court quote from the Thorley case as follows:

"If a workman has suffered an injury by breaking a limb or by a rupture while he is trying to lift a weight too heavy for him, then according to the ordinary use of language, one would say that the injury was caused by an accident which he met with while he was engaged in his work. I think the same rule of construction applies to the question before us, and that we should say that this man suffered from

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the bursting of a blood vessel while trying to lift a weight too heavy for him. That it might not have been too heavy for a man whose arteries were in a sound condition is nothing to the purpose. In the condition in which this man's arteries were he was undertaking a work which was too great for him.

"In Ismay, Imrie & Company vs. Williamson, 1 B. W. C. C. 232, it is held that where a seaman died from heat stroke while raking the fire that it was an accident entitling him to compensation. This is a House of Lords case and follows the rule laid down in the Thorley case.

"In Johnson v. S. S. 'Torrington,' 3 B. W. C. C. 70, it was held that where a fireman working in the hold of a vessel under great heat and drinking large quantities of water had an apoplectic stroke it was an accident within the meaning of the Compensation Law. The court treats the principle as established and holds that the determination of the case was a question of fact.

"In Hughes v. Clover Clayton & Co. 2 B. W. C. C. 17 (The Spanner Case), the court say:

"Every man brings some disability with him. Any exertion of any external action which might have been innocuous to a man in good health may produce most serious results to the workman bringing with him as I have said, some disability. This man brought with him a disability of a serious nature—an aneurism—which I quite agree might have caused his death at some time or other without any exertion, usual or unusual. But in this case we have this fact found that a strain incurred by the workman in the ordinary discharge of his duties caused the rupture from which he died. As I read the decisions in the house of Lords it is not open to this court to say that this is not an accident. It is impossible, I think, to read the judgment of Lord McNaughton in Fenton v. Thorley without seeing that this case is exactly and precisely within the language which he used. But if there were any doubt about that the more recent decision of the House of Lords in Ismay, Imrie & Co., vs. Williamson is really a much stronger case than this.

"In that case Lord Loreburn said:

"To my mind the weakness of the deceased which predisposed him to this form of attack is immaterial. The fact that a man who had died from a heat stroke was by a physical debility more likely than what befell him is to be regarded as an accident or not. If a work-others so to suffer can have nothing to do with the question whether man in the reasonable performance of his duties sustains a physiological injury as a result of the work he is engaged in, this is an accidental injury in the words of the statute.

"In the case of Broforst v. S. S. Blomfield, VI B. W. C. C. 613, where a workman shoveling coal in the fire of a vessel had an apoplec-

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tic stroke which was found by the trial court to be due to the rupture of an artery in the brain which was attributed to heat and exertion; it was held that he was entitled to compensation and that the question was one of fact which the appellate court could not review.

"From a careful examination of all the facts and evidence in the case, the Board is of the opinion that the strain upon the weakened arteries of the applicant caused by over-exertion and excessive heat was more than they could stand and resulted in the rupture of a blood vessel in the brain which was followed by a gradual effusion of blood resulting in the gradual paralysis and finally disabling one side of the body.

"The award of the committee will be reversed and applicant granted compensation."

We cannot state the claim of appellant better than to quote from the reply brief as follows:

"As pointed out in his brief respondent does not question the Industrial Accident Board's finding of facts; but does affirm that the essential facts are not clearly stated, and that it is necessary to refer to the testimony to understand what the Board means by certain words, phrases and references.

"Before doing this, however, counsel for respondent wishes his position as to the law distinctly understood, so that his comments upon the finding of the Board may be read in the light thereof.

"Counsel for respondent claims that the principles, the arguments, the reasoning upon which the decision in Adams vs. Acme White Lead & Color Works, 182 Mich. 157 was based control the present case as effectually as it did the case there decided, notwithstanding claimant in the case at bar cannot be said to have suffered an 'occupational' disease.

* * * * * * * * * * *

"That the word 'accident' is not subject to a special construction, but must be understood in the light of common law definitions and common law decisions.

* * * * * * * * * * *

"Third. The accident contemplated by the Michigan Act must be some 'casualty' occurring on some day which can be definitely fixed, and from which the time within which notice of the injury must be given, and demand for compensation must be made, can be determined. This proposition is clearly indicated in the Adams case.

"Fourth. It is therefore submitted that unless it appears that some accident within the meaning of the common law occurred that was the exciting cause of the gradually-developing cerebral hemorrhage re-

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ferred to in the case, the claimant and appellee is not entitled to compensation under the Michigan Compensation Act."

Counsel cite other authorities in support of his contention, among them Feder v. Traveling Men's Association, 70 Am. State R. 214.

Counsel also contends that the authorities counsel for appellee cite from New Jersey and Massachusetts are not applicable because the statutes of those states are different from the Michigan Statute. It must be conceded there is some confusion in the authorities.

We cannot agree with counsel that the case of Adams v. White Lead & Color Works, supra, is conclusive of the instant case. In that case the sole question was, is an occupational disease within the Statute. It was held that it was not. The case is more like the case of Bayne v. Storage & Cartage Company, 181 Mich. 378. In that case Mr. Bayne undoubtedly intended to do the lifting which he did but he did not expect the effect would be to hurt his back with resulting pneumonia. In the instant case Mr. La Veck intended to do the prolonged work which the situation demanded, but he did not anticipate that because of doing so his blood pressure would be so increased as to result in the rupture of a cerebral blood vessel. According to the testimony of some of the physicians that result could be traced to the unusual hours of work and the unusual conditions. It was an unexpected consequence from the continued work in the excessively warm room.

Where there is testimony upon which the accident board can base its conclusion we will not review its action. Bayne v. Storage & Cartage Co., 181 Mich. R. 278; Redfield v. Insurance Co., 183 id. 633. Other cases than those mentioned in the opinion of the Industrial Accident Board which support its conclusions are Voorheis v. Schoonmaker, 86 R. J. L. R. 500; Doughton v. Heckman Limited, 6 B. W. C. C. 77; Maskery v. Shipping Co., Limited, 6 Neg. & Comp. Cases Ann. 708. See also the cases cited in note c, page 714 of 6 Neg. & Comp. Cases Annotated.

The order is affirmed.

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JOSEPH OLESKIE,
Applicant,
vs.
DODGE BROTHERS,
Respondent.

ATTORNEY'S FEES—POWER OF BOARD TO FIX FEES.

A contract between applicant and his attorney providing that such attorney shall receive fifty per cent of the compensation for services is held to be unreasonable and is disregarded.

Section 10, Part III, Workmen's Compensation Act, gives the Industrial Accident Board power to fix and determine the fees of attorneys and physicians, and in proper cases to order the payment of same out of the amount awarded for compensation.

Petition filed by attorneys of applicant to determine their rights under a contract for services, providing that they receive fifty per cent of the amount of compensation awarded. Contract held invalid and the value of the services rendered fixed by the Board.

Opinion by the Board:

This is a proceeding by petition to determine the rights of the attorneys for applicant under a contract made with him and for services rendered pursuant to the same. The injury involved the loss of applicant's leg and respondents denied liability. A contract in writing was made under which the attorneys were to receive fifty per cent of the amount recovered in case of success, but nothing in case of failure. The contract further gave the attorneys a lien on the cause of action and all moneys recovered, and assigned to them one-half of the same for such fees and their necessary disbursements. The case went to arbitration and, though vigorously contested by respondents, resulted in an award against them. They appealed from the decision and the case was heard before the full Board at Lansing, resulting finally in the recovery of

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compensation for the applicant aggregating $1,093.75. A part of this sum has already been paid and the attorneys claim they are entitled to fifty per cent of the remainder, or about $425.

This was a case requiring the services of attorneys. Respondents denied liability and prepared for a vigorous defense. The case was well handled by applicant's attorneys, and the services rendered were valuable. If the question is one of fixing the value of services rendered, and we think it is, such value in the opinion of the Board is $150. The evidence shows in detail the various proceedings and the services rendered, and shows the case to be an unusual one. However, the 50% provided in the contract is an unreasonable amount, and the contract in this respect must be disregarded. The Workmen's Compensation Law, even in cases like this, has greatly reduced the amount of legal work and minimized the delay and expense. What would not be an unreasonable percentage under the old system would be entirely unconscionable under the present law. The applicant is a foreigner unable to read English or reasonably understand the language, ignorant of the proceedings under the Workmen's Compensation Law, and while there was no fraud, it presents a proper case for the intervention of the Board to fix the amount.

The more difficult question in this case is whether the Board has power to order the payment of attorney fees out of the compensation moneys. An examination of Section 10, Part III of the Law discloses that the language used relative to attorney fees is that, "The fees and the payment thereof of all attorneys and physicians for services under this Act shall be subject to the approval of the Industrial Accident Board." The general meaning of approval is to sanction, and it is frequently used in the sense of passively commending. It seems, however, that the word as here used in the compensation law is in its active sense and means to pass judgment upon. It is clear that the Board possesses no powers except those granted expressly or by implication in the Statute. We quote:

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"All questions arising under this Act, if not settled by agreement by the parties interested therein, shall, except as otherwise herein provided, be determined by the Industrial Accident Board."—Section 16, Part III of the Act.

This, together with the provisions of Section 10, Part III and the general administrative provisions of the Act, seems to be a grant to the Board of full power to determine the question arising under the Act as to the amount of the fee and the relative rights of the parties. But does this power to determine questions as to attorney and medical fees carry with it the power to direct the payment of the same out of the funds involved in the proceeding? The question is an important one, as the Law applies equally to legal and medical fees. Both are covered by the same section and language of the Statute, and if the position of the respondents in this case is upheld, an injured man who has nothing but his disputed claim for compensation under the law, would be rendered powerless to help himself. He could not lawfully assign or pledge a portion of such compensation (if finally recovered) for either medical or legal aid, no matter how badly same was needed, and would therefore be deprived in many cases of the means of curing his injuries or enforcing his rights. This would fairly be the result if he could make no contract for medical or legal services that could be enforced.

The approval mentioned in Section 10, Part III of the Statute is two-fold: viz., *of the fee* and *the payment thereof*. It is easy to see how this provision would apply in cases where the parties disagree only as to the amount and are willing to make payment as soon as the Board approves the amount. The power to approve carries with it by implication the power to disapprove, and the power to allow what, in the judgment of the Board is fair and just. If, however, the authority of the Board ends here, and it merely has the right to express its opinion as to the amount of such fees, but has no authority to enforce or give effect to such opinion, or to take any action that would entitle such opinion even to respect, then the provisions above quoted would be nugatory. It seems clear that

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the provisions of the above section were intended for use in the practical administration of the Law, and when read in connection with the other administrative features of the Act and its general plan and purpose, were intended to give the Board authority to deal effectively with such matters, and this would imply the authority to enforce its determination by directing payment.

ANDREW BACIK,
Applicant,
vs.
THE SOLVAY PROCESS COMPANY,
Respondent.

JUDGMENT—RES ADJUDICATA—JURISDICTION.

Applicant received compensation from respondent and signed a settlement receipt therefor. He returned to work before he had entirely recovered and later was forced to quit again through disability caused by the original injury. Respondent caused a judgment for the amount of compensation it had paid to applicant to be entered against it in the Circuit Court, and upon applicant's filing a petition praying that the case be reopened and that he be awarded further compensation, respondent refused payment on the ground that by reason of the judgment previously rendered the entire matter is res adjudicata and cannot be reopened.

HELD: 1. That the ex-parte action of respondent in causing judgment to be rendered against itself does not affect the right of applicant to further compensation.

2. The Industrial Accident Board is expressly given jurisdiction to review and pass upon questions of this kind, arising relative to the payment of compensation.

Application of Andrew Bacik for further compensation for injury occurring while in employ of Solvay Process Company. Granted.

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Opinion by the Board:

On December 11, 1914, applicant filed his petition in the above cause praying that same be re-opened and that he be awarded further compensation on account of continuing disability. He was injured on March 26, 1914, by falling from a scaffold. An agreement for compensation was made and approved by the Board on May 15, 1914, and under this agreement compensation was paid from time to time at the rate of $7.02 per week aggregating $52.39, the last payment being made and Settlement Receipt signed on June 6, 1914. The applicant went back to work for a time though still suffering disability and still being treated by respondent's physician. Later he gave up the work and claims that he has since been unable to work on account of the injury. After the filing of his petition asking for further compensation, respondent procured a certified copy of the Agreement in Regard to Compensation approved by the Board, and filed the same in the Circuit Court of Wayne County and caused a judgment to be rendered against it, as follows:

"STATE OF MICHIGAN,
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE.

At a session of said Court held at the Court House on Thursday, the 31st day of December, A. D. 1914.

Present: Hon. Alfred J. Murphy, Circuit Judge.

Andrew Bacik
vs.
The Solvay Process Company,
a corporation.

"In this cause, there having been presented to the said Court by the said Solvay Process Company a duly certified copy of the Agreement of Settlement approved by the Industrial Accident Board as provided in Section 13, part 3 of Act No. 10 of the Public Acts of 1912 passed at special session, and it appearing from said certified copy that the said Andrew Bacik is entitled to receive the sum of Seven and 2/100 dollars ($7.02) per week beginning on March 26th, 1914, and continuing for the period of disability, and it also appearing from the certified copy of the Final Report of Accident that said Andrew Bacik

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returned to work on May 18th, 1914, making a disability period of 7 3/7 weeks,

THEREFORE, it is determined that said Andrew Bacik do recover and have judgment against said Solvay Process Company in accordance with said Settlement Agreement and Final Report in the sum of $52.39 without costs.

(Signed) ALFRED J. MURPHY,
Circuit Judge."

It will be seen that this judgment was entered on December 31, 1914, several months after the payment by respondent of the sum of money which the judgment purports to cover, and after the filing of applicant's petition and before the same came on to be heard. Respondent claims now that by reason of the entry of such judgment in the Circuit Court of Wayne County, the entire matter is res adjudicata and that it cannot be re-opened, and is not subject to the further action or jurisdiction of the Board.

We are of the opinion that the substantial rights of the applicant are not affected or cut off by the ex parte action of respondent in going through the extraordinary and needless procedure of causing judgment to be entered in the Circuit Court against itself for an amount that it had already paid to the applicant. The evident purpose of Section 13, Part III of the Law, which provides for the rendition of judgments by the Circuit Courts of the various counties based upon awards of the Board or agreements approved by it, is to provide a means for the enforcement of such awards and agreements. It certainly was not intended to furnish a means of ousting the Board of jurisdiction in a pending proceeding by having a judgment entered in this way under the section.

The objection fails for the further reason that under the provisions of Section 14, Part III of the Law, the Board is expressly given jurisdiction to review and pass upon questions arising relative to the payment of compensation in cases of this kind at any time within the limits prescribed by Law, and to terminate, diminish or increase the compensation if the facts warrant such action. The judgment entered in the cir-

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cuit court merely covers the period of compensation between the injury and the time when the $52.39 accrued, and directs that the applicant recover that sum. The Compensation Law limits the power of such court to the rendition of a money judgment for the sum fixed either by the award or the approved agreement. Such judgment would not in any way conflict with a subsequent claim for additional compensation in cases where the disability in fact continued beyond the estimated time.

From a careful examination of the proofs the Board has reached the conclusion that the applicant's petition should be granted and that he is entitled to further compensation. From the evidence now on file it is not clear as to how long applicant's total disability continued, or whether he has now recovered so as to be able to resume his former employment. If the parties are unable to agree as to the amount of additional compensation, the Board will direct the taking of further proofs in the case on this particular question, and will then enter an order fixing the liability.

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SIDNEY DYER,

Applicant,

vs.

JAMES BLACK MASONRY & CONTRACTING COMPANY,

and

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD.,

Respondents.

EMPLOYE—INDEPENDENT CONTRACTOR—CASUAL EMPLOYMENT.

The applicant was injured while assisting in unloading glass. He was doing work for the principal contractors on the David Stott Building in Detroit, pursuant to a sub-contract which he held from them. He was doing the work of unloading the glass at the time of his injury pursuant to a verbal arrangement with such principal contractors to assist in such unloading from time to time, said principal contractors to pay him for the work so performed. Respondents deny liability on the grounds: (1) That the applicant was an independent contractor; (2) That the accident did not arise out of and in the course of his employment; and (3) that if an employe, then his employment was but casual.

HELD: 1. That while the applicant's firm, Dyer and Ross, were clearly contractors, the arrangement which the respondents made with Sidney Dyer was for the performance of work and service outside of the contract of Dyer and Ross, and included his giving such assistance in unloading the glass as he might deem necessary, and his injury occurring while engaged in this work, arose out of and in the course of his employment.

2. The work was intermittent rather than steady in its nature, and the fact that it would extend over a number of months and would have continued until the job was finished negatives the claim that the employment was but casual.

Application of Sidney Dyer for compensation for injury received while unloading glass pursuant to agreement with James Black Masonry & Contracting Company. Compensation granted.

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Opinion by the Board:

The applicant was injured on December 10, 1914, while assisting in unloading glass at the David Stott Building in Detroit. He was at the time of the accident engaged in doing the glazing on the building in question under the following written contract, viz.:

"Detroit, Nov. 19, 1914.

Sidney Dyer & John Ross,
City,
Gentlemen:—

We hereby accept your proposition for furnishing all labor and materials necessary (with the exception of the glass) for glazing all the glass in the Davit Stott Building, as called for in the revised Specifications dated June 2nd, 1914 and the plans, for the sum of Three Hundred and twelve dollars ($312.00), payable at the completion of the work and the acceptance of the Architects, Marshall & Fox.

"It is understood between us that the glass is to be furnished you at the site of the said building and you are to take it from there and glaze it.

"It is also understood that you are not to glaze any glass which is called for to be done by any other contractor rather than the glazing contractors. The glazing contractors are Sidney Dyer and John Ross, working under the name of Dyer & Ross.

"It is mutually understood that the Glazing Contractors are to be responsible and will replace all glass broken by them in handling or setting the glass.

JAMES BLACK MASONRY & CONTRACTING CO.,
By A. E. Black (Signed)
Vice-President.

EAB:CVR
Nov. 19, 1914.
Accepted by DYER & ROSS
By SIDNEY DYER (Signed)
Glaz. Contractors."

It will be seen from this written agreement that the principal contractor was to furnish the glass delivered at the site of the building, and in carrying out the contract the glass was in fact delivered from time to time at the building by the Pittsburg Plate Glass Company. The principal contractor arranged with Mr. Dyer that he look after the delivering of the glass at the building and see to the unloading, for which

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services Mr. Dyer was to receive payment from the principal contractor. The injury to Mr. Dyer occurred when he was assisting in the unloading of glass at the building under this arrangement. The respondents deny applicant's right to compensation on the following grounds:

(1) The accident did not arise out of and in the course of the employment.

(2) That he was an independent contractor.

(3) That if an employe, then his employment was but casual.

In doing the work of glazing the building under the above written agreement, the applicant was clearly a contractor. He is so described in the writing itself, which contains all the elements of a contract, and included the furnishing of a part of the material by the applicant, viz: everything "with the exception of the glass." The work was to be done according to the architects' specifications and in such a manner as to be accepted by the architects of the building. No control over the work or the manner of doing it is reserved by the principal contractor, the applicant and his partner being required merely to perform the work in accordance with the architects' specifications and be responsible for the result.

The arrangement made with the applicant under which he was to look after the delivery and unloading of the glass fairly includes giving such reasonable assistance in unloading as he might deem necessary. It cannot reasonably be restricted to merely overseeing and directing, but fairly included any reasonable assistance in loading the glass which was reasonably necessary to accomplish the object for which he was employed. The injury therefore which he received in assisting in the unloading arose out of and in the course of his employment.

The arrangement under which applicant was to look after and assist in the unloading of the glass was no part of his contract work. While it is doubtless true that the arrange-

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ment was made with him because he was doing the glazing on the building, it might have been made by the principal contractor with any other person who happened to be in the vicinity and who could conveniently do the work at such times as the loads of glass arrived at the building. It seems clear that the applicant was the employe of the principal contractor for the work in question, and that he is entitled to compensation for the injury unless the employment was casual within the meaning of the Workmen's Compensation Law.

It should be noted that this work was being done by Sidney Dyer individually, and not by the firm of Dyer & Ross. It was billed as an individual account with Mr. Dyer and paid as such. The date of the contract for the glazing work was November 19, 1914; the injury occurred on December 10, 1914; and it appears from the evidence that the work was not finished until the latter part of March. It also appears that the work to be done was periodic in its nature, that is, from time to time as the loads of glass arrived at the building. The building was a large one and the time during which this work would have continued had it not been for the accident, would extend over a number of months. While it is true it was not steady work, or work that consumed a larger portion of his time, yet it recurred at intervals with the progress of the work and would have continued until the job was finished. Under these facts we think that the employment was not casual.

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SANFORD HINDMAN,
Applicant,
vs.
ACME UNIVERSAL JOINT MANUFACTURING COMPANY,
and
EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD.,
Respondents.

CYANIDE POISONING—OCCUPATIONAL DISEASE AND NOT AN ACCIDENT.

Applicant was employed at a forge in the plant of respondent where cyanide was used on red hot steel, causing it to vaporize and be inhaled. After following this work for some time, he was taken violently ill as a result of the inhalation of such gases and is now totally disabled. Respondents filed petition to be relieved from paying further compensation on the ground that applicant was not suffering from an accident but from an occupational disease.

HELD: That the disability resulting from the inhalation of cyanide fumes was not caused by a sudden occurrence, but by a gradual process, and was an occupational disease and not an accident.

Opinion by the Board:

In this cause a petition was filed by respondents asking to be relieved from making further payments of compensation for several reasons, among them being that the disability of the applicant came from an occupational disease and not from an accident. Applicant was employed at a forge in the plant of the Acme Universal Joint Mfg. Company where cyanide was used on the red-hot steel, causing it to vaporize and be inhaled. He continued at this work from June until September, 1912, when he was taken violently ill and has since been in a state of total disability. It seems clear that the disabil-

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ity was caused not by a sudden occurrence but by a gradual process through which the cyanide poison was absorbed into the system, making it an occupational disease instead of an accident. It having been held by the Supreme Court in the case of Adams vs. Acme White Lead & Color Works, 21 Detroit Legal News Page 824, that such injuries are not covered by the Law in its present form, it follows that the petitioners are entitled to be relieved from making further payments of compensation, except that they shall make the payments up to the time of the filing of their petition for relief, August 31, 1914.

CALEDONIA MARSHALL,
Applicant,
vs.
CITY OF DETROIT,
Respondent.

MUNICIPAL CORPORATIONS SUBJECT TO WORKMEN'S COMPENSATION LAW—WHICH SUPERSEDES CHARTER PROVISIONS.

Applicant's decedent was employed by the City of Detroit as a garbage wagon driver, and while engaged in his duties he received injuries which resulted in his death. Applicant was refused compensation under the Workmen's Compensation Act for the following reasons:

1. Because she did not comply with provisions of the Charter of the City of Detroit in filing a claim against the city in the manner provided by its charter.
2. The Charter of the City of Detroit, being a local act, is not affected by the provisions of the Workmen's Compensation Law.
3. The Act, so far as it is mandatory upon municipal corporations, is unconstitutional.
4. By accepting a settlement of five hundred dollars, applicant should be barred from further prosecuting her claim.

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HELD: 1. That the provisions of the Charter of the City of Detroit relative to filing claims against the city are superseded by the Workmen's Compensation Act which is especially made applicable to every city within the State.

2. Sections 7 and 8, Part I, Workmen's Compensation Law, expressly make that law applicable to every city in the state.

3. The Constitution does not prevent the Legislature from imposing upon municipalities the duty of paying compensation to workmen injured while in their employ, such duty being imposed by a *general law*.

4. Inasmuch as the settlement made with the applicant was made without reference to the Workmen's Compensation Act, such settlement would not become binding until approved by the Industrial Accident Board, but the amount will be treated as equitably applying upon the compensation to which she was entitled under the Act.

Opinion by the Board:

William Marshall, the husband of the applicant was employed by the city of Detroit through its Department of Public Works, and on December 17, 1912, he was severely injured by the slipping of a chain which threw him from the garbage car on which he was working. On March 30, 1913, he died. It is claimed that his death resulted from his said injury, and at the arbitration of the case testimony was introduced tending to support this claim. At such hearing an award was made in favor of the applicant for compensation at the rate of $7.50 per week for 300 weeks, less $87.84 received from respondent by Mr. Marshall prior to his death and the sum of $500.00 paid the applicant by respondent after the death. An appeal was taken from this award to the full Board for review. The case has been fully argued and briefed by the parties, the principal contention on the part of the respondent being based upon the legal questions raised. Competent evidence was offered in support of the applicant's claim that the accident was the cause of the death of William Marshall on March 30, 1913, and in the opinion of the Board fairly established such claim.

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The contention is made by respondent that applicant's claim is barred because she did not comply with the provisions of the Charter of the City of Detroit in filing a claim against the city under such Charter provisions, and it is argued in support of this contention that the Charter of the City of Detroit, being a local act, is not modified or affected with reference to the above requirement by the Workmen's Compensation Law, which is a general act. The rule of construction is well settled that a general act will not be construed as affecting a local act except in cases where it does so expressly or by necessary implication. However, the provisions of Sections 7 and 8 of Part I of the Workmen's Compensation Law expressly make that Law applicable to every city within the state, which necessarily means that it is applicable to the city of Detroit. The language of the statute will bear no other construction. The Compensation Act specifies the notices that are required and the time and manner of making claim, and in this respect must be held to supersede the provisions of the Charter of the City of Detroit.

It is contended that the act is unconstitutional because it is mandatory as to cities and other municipalities, it being elective as to private corporations and persons. Whatever may be said as to the constitutional rights of private corporations and persons, it seems clear that cities stand on a very different basis. Under the general rule of law laid down in the books, cities are mere creatures of the Legislature possessing only the rights and powers expressly granted in their charters, subject to modification or repeal at any time. While the Constitution of 1909 confers upon the cities of Michigan extensive powers of local self-government, it does not affect the power of the Legislature over cities when exercised through a general law designed to promote the public welfare. In the opinion of the Board it was clearly competent for the Legislature to impose upon municipalities the duty of paying compensation to workmen injured in their service, or to the dependents of such workmen in case of death.

It is urged that applicant should be barred from prosecut-

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ing her claim in this case for the reason that she has not rescinded the settlement which she assumed to make with respondent and on which she received the sum of $500. It is contended that said applicant having spent said sum of money and being unable to return it to the city, and therefore unable to rescind the settlement, her claim must be denied. This settlement was made without reference to the Compensation Law, and was not reported to or approved by the Board. Under Section 5 of Part III of the act such settlement would not become binding on the parties until approved by the Board, and not having been approved, never became a settlement in law. Therefore no rescission was necessary. The most that can be required under the circumstances would be that the amount of money which applicant received from respondent be treated as equitably applying upon the compensation to which she was entitled, and this was done by the award.

The Department of Public Works is an agency of the City of Detroit merely, the city itself being the principal. This department, we think, can fairly be treated as an important and we might say a general agency of the city with reference to the matters and men having to do with the Public Works of the City. However, the question of notice to the city and of making claim in this case seems to be placed beyond dispute by the action of the parties themselves. William Marshall died on March 30, 1913, and by reason of his death the claim of the applicant in this case came into being. On April 22, 1913, we find that the applicant is asserting her claim against the city and giving testimony in support of it before the committee on claims of the Common Council, the $500 settlement being made by the city with her the following month. It appears to be undisputed that the city had knowledge of the injury and that the claim was asserted by applicant within the statutory time. Any lack of formality in the service of notice or in the making of claim must be deemed to have been waived under the facts here shown.

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HAROLD LINSNER,
Applicant,
vs.
CONSUMERS ICE AND FUEL COMPANY,
and
GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPORATION,
Respondents.

COMPENSATION FOR DISABILITY CAUSED BY HYSTERIA AS RESULT OF INJURY. Applicant suffered an injury to his foot, for which he was paid compensation from February 12, 1914, to December 17, 1914. Respondents thereafter filed a petition praying to be relieved from paying further compensation on the ground that applicant was then suffering from hysterical neurosis. The hysterical condition was the result of the accident, and still renders applicant partially disabled.

HELD: That where hysterical neurosis comes as a result of an injury, the one injured is entitled to compensation during the continuance of the disability arising from that cause.

Petition by Consumers Ice & Fuel Company for relief from payment of compensation to Harold Linsner for partial disability caused by hysterical neurosis. Denied.

Opinion by the Board:

The applicant in this case was injured on February 12, 1914, by having his foot jammed between two cakes of ice. On April 17, 1914, an agreement for compensation at the rate of $7.00 per week was filed in the case, and under this agreement compensation was paid until December 17, 1914. On January 6, 1915, a petition was filed by respondents praying that they be relieved from paying further compensation, based mainly upon the claim that applicant was now suffering from hysteria or hysterical neurosis. It is not disputed that the applicant is still partially disabled and that his present condition is a result of the accident.

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The Board is of the opinion that hysterical neurosis such as the evidence shows in this case entitled the injured man to compensation when it comes as a result of the injury. Almost the precise question was passed upon by the Supreme Court of Massachusetts in the case of Hunnewell vs. Casualty Company of America 107 Northeastern Reporter, 936. We quote from the opinion in that case as follows:

"The physical injury to the eye of the employe in the case at bar was slight and he soon recovered from it completely so far as concerned harm to the organ itself. But the committee of arbitration found that 'the injury to the eye caused a nervous upset and a neurotic condition which is purely functional.' The Board found that he was 'partially incapacitated from work by reason of a condition of hysterical blindness and neurosis, said condition having a casual relation with the personal injury.' These findings which seem to be identical in substance, were warranted by the evidence. Apparently he did not have sufficient will power to throw off this condition and go to work as his physical capacity amply warranted him in doing. But such a condition resulting from a battery is an injury for which a tort-feasor would be liable in damages. Spade v. Lynn & Boston R. R., 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393; Id., 172 Mass. 488, 52 N. E. 747, 43 L. R. A. 832, 70 Am. St. Rep. 298; Berard v. Boston & Albany R. R., 177 Mass. 179, 58 N. E. 586; Homans v. Boston Elev. Ry., 180 Mass. 456, 62 N. E. 737, 57 L. R. A. 291, 91 Am. St. Rep. 324; Bell v. N. Y., N. H. & H. R. R., 217 Mass. 408, 410, 104 N. E. 963. The same principles applies to injuries following as a proximate result from an actual physical impact received by an employe under the act in the course of and arising out of his employment."

The applicant is entitled to full compensation up to the date of the filing of the petition, and to compensation after that date during the continuance of his partial disability at the rate of $3.50 per week.

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JAMES H. McKAY,
Applicant,
vs.
CITY ELECTRIC RAILWAY COMPANY,
Respondent.

INJURY CAUSED BY THIRD PERSON—EMPLOYEE HAS THE RIGHT TO ELECT BUT CANNOT MAKE CLAIM AGAINST BOTH.

Where an employe suffers an injury while in the course of his employment, which injury is caused by some person or agency not connected with the employment, he may elect whether to sue the party directly responsible for his injury or make application to his employer for compensation.

HELD: That an employe cannot accept payment in lieu of damages from the person causing his injury and draw compensation from his employer at the same time. Any money so paid shall be applied on the amount of compensation awarded him.

Application by City Electric Company for reduction in amount of compensation paid to James H. McKay. Granted.

Opinion by the Board:

The applicant was injured while in the employ of respondent, the injury being caused by the fall of a steel rail which applicant and others were carrying across a highway, and which was struck by an automobile owned by one Philip Higer of Port Huron. The steel rail belonged to respondent and the work of carrying it was a part of applicant's regular employment. Philip Higer, the owner of the automobile in question, was away from home at the time and his automobile was taken out of his garage by one Biddlecomb who acted on the request of Mr. Higer's sister-in-law who lived in the neighborhood. On September 18, 1914, an Agreement in Regard to Compensation was made by applicant and respondent under which applicant was to receive compensation at the rate of

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$7.33 per week during the continuance of disability. Six days later, on September 24, Mr. Higer while denying all liability to applicant, paid him the sum of $150 and received from the applicant a full release for "all damages present and future arising from a collision with auto of said Higer driven by H. Biddlecomb on August 25th, 1914, while working on a rail for City Electric Railway Company in the City of Port Huron."

Some compensation was paid under the above agreement made by respondent, and on March 2, 1915, respondent filed a petition praying to be relieved from making further payments for the reason that applicant had made settlement with and received damages from a third person, Philip Higer, and that said action barred his right to further compensation from respondent. The petition is based on Section 15, Part III of the Workmen's Compensation Act, which is as follows:

"Sec. 15. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employe may at his option proceed either at law against that person to recover damages, or against the employer for compensation under this act, but not against both, and if compensation be paid under this act the employer may enforce for his benefit or for that of the insurance company carrying such risk, or the commissioner of insurance, as the case may be, the liability of such other person."

The provisions of the above section are substantially the same as those of the early British Workmen's Compensation Acts, and a review of the authority shows that such provisions have been upheld and given effect by the British Courts. Under the provisions of our Act, the employer who pays compensation to his injured workman is clearly entitled to the right of action that such injured workman may have against a third party on account of the accident. The settlement and release given by the applicant in this case disposed of this right of action which otherwise would belong to the employer. Whether the employer would prosecute such right of action if the settlement had not been made, is unimportant in this case, as the Law gave him the right to do so. The claim of the peti-

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tioner in this case that the sum of $150 so received by the applicant should be applied *pro tanto* upon the compensation that the applicant otherwise would be entitled to recover, must be granted.

WILLIAM PURDY,
Applicant,
vs.
CITY OF SAULT STE. MARIE,
Respondent.

MUNICIPAL CORPORATIONS—EMPLOYES—INJURY ARISING IN COURSE OF EMPLOYMENT—ELECTION TO COME UNDER ACT.

Applicant, a man of seventy-five years of age, was employed as a street sweeper by the city of Sault Ste. Marie. While working on the streets he was accidentally run down and injured in such a way that he was entirely deprived of the use of his left foot. Compensation was refused because (1) no negligence on the part of the municipality or its officers was shown; (2) the injury did not arise out of claimant's employment; (3) the municipality was not served with notice of his claim for damages; (4) because the notice provided by Act 10, P. A. 1912, was not served upon the city; (5) because the city had not elected to come within the provisions of the Act.

HELD: 1. That the accident arose out of applicant's employment, and that the liability of the City is not affected by the fact of no negligence on the part of itself or its officers.

2. That the officers of the City had knowledge of applicant's injury, and that it was not necessary to serve notice of claim for damages in accordance with the charter provision, such provisions being superseded by the Compensation Law.

3. That by the terms of Act No. 10, Public Acts of 1912, all municipal corporations automatically become subject to its provisions, and no election is necessary.

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Appeals by both City of Sault Ste. Marie (respondent) and William Purdy (applicant) to the Industrial Accident Board, from the decision of an arbitration committee awarding applicant $5.00 per week for 125 weeks for the loss of use of his left foot. Decision of arbitration committee affirmed.

Opinion by the Board:

The Committee on Arbitration awarded the applicant in this case $5 per week for a period of 125 weeks. The injury to the applicant's left leg was such as to deprive him entirely of the use of the foot, although the foot was not amputated. The arbitrator chosen by the Applicant and also the arbitrator chosen by the Respondent filed written opinions in the case. Appeals were taken by both the Applicant and the Respondent to the full Board of Review, and after a full hearing the award on arbitration is affirmed. The opinion filed by Frank P. Sullivan, the arbitrator for Respondent, so fully covers and presents the issues in the case that it is the substance adopted by the Board (with the exception of the concluding paragraph on the amount to be awarded), said opinion being as follows:

"The claimant, William Purdy, was employed by the city of Sault Ste. Marie for about five weeks as one of its street sweepers, during the months of August and September, in the year 1912.

While engaged at work on the streets he was accidentally run down and injured by a conveyance using the public streets.

He was a man about 75 years of age, and had been employed for a day or two in excavation work by the city and was placed at street sweeping because he was not fitted for the more arduous labor. He makes claim for compensation under Act No. 10 of the Public Acts of 1912, special session.

Mr. Purdy's left leg, between the ankle and the knee, was fractured and the union of the bones was such as to make the foot practically useless.

It is claimed on behalf of the city that the municipality is not liable because:

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(1st) No negligence on the part of the municipality or any of its officers, agents, or employes, was shown.

(2d) The injury did not occur through the agency of any employe or officer of the city and was not one arising out of the claimant's employment.

(3d) Claimant served no notice upon the common council of said city or the proper city officers of his claim for damages, as provided by the terms of the city charter in such claims

(4th) Because no notice of the injury as provided by Act No. 10 of the Public Acts of 1912 was served upon the respondent city or any of its officers.

(5th) Because the city had not elected to come within the provisions of Act No. 10 and the provision in the act making it applicable to cities does not apply.

Section 1 of Act No. 10 gives to every employe the right to recover damages (compensation) for personal injuries sustained in the course of his employment, against his employer.

Subdivision 1 of Section 5 of the act provides that the state, and each county, city, township, incorporated village, and school district therein shall automatically come under the act without any action on the part of the municipality. Every other employer must elect to come under the act before being liable to its provisions.

Act No. 50 of the Public Acts of 1913, on page 73, adds to Subdivision 1 of Section 5 the following:

'And each incorporated board or public commission in this state, authorized by law to hold property and to sue and be sued.'

No other change is made by subsequent amendments affecting this case.

Section 5 of the act automatically brings the employer city under its terms unless the claimant who was employed by the board of public works of the city of Sault Ste. Marie, was an employe of an incorporated board or commission authorized by law to hold property and to sue and be sued, the employes

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of which are not automatically brought under the act until after the amendment to Section 1 of said Section 5, made by Act No. 50 of the P. A. of 1913.

Obviously, the board of public works of said city is not such a board or commission as is contemplated by this amendment. It is one of the agencies by which the functions of the city are exercised, and has none of the powers or privileges enumerated in the amended statute.

It is conceded the claimant was injured while in the employ of the city by being run over or against by a vehicle using its public streets and through the probable carelessness of the driver. The injury was not because of or through any agency connected with or incident to the employment, but caused by the act of a third party.

Was it, then, received in the course of his employment, within the meaning of Section 1 of the act?

This act is remedial and should be construed liberally and generously, in favor of the injured servant. It is designed to afford compensation for injuries accidentally and even negligently suffered on the part of the employe, where such negligence was not intentional or wilful, and eliminates the doctrines of contributory negligence, fellow servant, and safe place, and assumption of risk.

The object of this law is to obviate, rather than to set in motion, technical inquiries and defenses, with which courts are familiar and often very much puzzled. It is designed and should receive the broadest possible construction without doing violence to the spirit and language of the act.

It is not, however, intended to make the employer an insurer of the safety of his employes, under any and all conditions and from any cause, whether or not the injury results from and arises out of the employment.

One of the dangers to be apprehended in the usual course and conduct of the work in question is just what did happen, and it is one of the incidents connected with the employment.

The measure is so salutary, the theory of the legislation so fully in accord with the progressive economics, employers

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have so generally adopted it and complied with its terms without litigation and in a spirit of harmony which has much to do with its successful administration, that I should deem it worthy of much more careful research and inquiry if this finding were to be a precedent.

It has been held that a risk is incidental to the employer when it is an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected with the employment, owing to the special nature of the employment. It is not essential that there be any negligence on the part of the city, and the act does not contemplate making provision for negligent injuries, but for accidental injuries—any accident arising out of the employment is within its terms, and an accident arises out of the employment when it is a risk which might have been contemplated by a reasonable person when entering the employment, as incidental to it.

The work of the complainant was performed upon the public streets. He is somewhat aged, and somewhat deaf, and necessarily must occupy the traveled way of the public streets when doing this work. It seems to me that it needs no argument to satisfy one that being run over or against by a passing vehicle is one of the risks incident to this employment. The injury may have been accidental, but if it was accidental it is to be compensated for by the city.

An "accident" is defined as: "An unlooked for and untoward event, which is not expected or designed." There is no evidence that the driver of this rig intentionally ran upon and over this claimant.

Bryant vs. *Fessell,* 2 Negligence and Compensation Cases, P. 585.

It has been held that an engineer, while driving his train under a bridge, who was injured by a stone dropped by a boy from the bridge, was an accident arising out of and in the course of his employment.

Challes vs. *London & Southwestern Ry.,* 2 K. B., 154.

The court here fixed its decision on the fact that a train in

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motion is a great attraction for mischievous boys and an object at which to hurl missiles.

In *Nesbitt* vs. *Rouge and Burns,* 2 K. B., 689, it was held that the death of a cashier who was robbed and murdered on a railway carriage while carrying money to pay the wages of his employer's workmen, was caused by an accident arising out of and in the course of his employment, on the ground that the risk of being robbed and murdered is a risk incident to the employment of those who are known to carry considerable money in cash on regular days over a regular route, to the same place.

It was held in *Anderson* vs. *Balfour,* 2 Irish Rep., 297, that an injury sustained by a game keeper through criminal conduct by poachers, was one arising in the course of his employment.

'Injury to a salesman and collector caused by being kicked by a passing horse, while he was riding on the street on his bicycle, in the course of his business, is held to be an injury arising from his employment.'

McNeice vs. *Singer Sewing Machine Co.,* 48 Scot. Law Rep., 15.

I think it is very plain, without the citation of further authority, that it must be held the injury was one sustained by this employe in the course of his employment.

The act, as I said before, automatically brings the respondent city within its terms. Until a court of last resort should say that the attempt of the Legislature to do this was not effective I should deem it my duty to hold according to the literal language of the act.

Considerable trouble has been experienced with reference to the notices required, by both the charter and the act itself, to be given by an injured employe to his employer. The charter of the respondent city provides that within sixty days all claims for personal injuries or otherwise must be presented to the common council and verified.

This has not been done. The authorities are numerous

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which sustain the position that unless the charter provisions are complied with and the claims presented, all right of action against the city is lost, but none of them arise under this statute.

The act in question provides for notice being served upon the city within three months after the happening of the injury, and notice of a claim for damages under the act within six months after death or removal of physical or mental incapacity. Section 18 of the act provides: "Want of written notice shall not be a bar to proceedings under this act, if it be shown that the employer had notice or knowledge of the injury."

The testimony discloses that the city officers and members of the common council generally had notice of the injury, in ample time. That no specific notice was officially served upon them until after the expiration of three months must, I think, also be determined from the evidence.

However, the object of a notice is to prevent fraud and to permit the city authorities to collect its evidence before the parties having knowledge of the same are scattered and this knowledge lost.

I think that it has been sufficiently shown that the city, in its official capacity, and nearly all of the city officers (including the board of public works), had knowledge of the injury, and more or less desultory consultation and conferences had respecting it. I believe this notice to be sufficient. The claim for injury was filed, or left with the recorder, within six months from the date of the injury."

The decision of the Board in this case was affirmed by the Supreme Court, the following being the opinion filed by said Court:

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SUPREME COURT.

WILLIAM PURDY,

Claimant and Appellee,

vs.

CITY OF SAULT STE. MARIE,

Defendant and Appellant.

1. STATUTES—TITLE—WORKMEN'S COMPENSATION ACT—REPEAL OF CITY CHARTER PROVISIONS.

The Workmen's Compensation Act is entitled "An act to promote the welfare of the people of this state, relating to the liability of employers for injuries or death sustained by their employes providing compensation for accidental injury to or death of employes and methods for the payment of * * * same, establishing an Industrial Accident Board, defining its powers, providing for a review of its awards, making an appropriation to carry out the provisions of this act, and restricting the right to compensation or damages in such cases to such as are provided (for) by this act," and provides, in part 6, §5, that it expressly repeals "all acts and parts of acts inconsistent with this act," and "replaced by this act."

HELD: That the charter provisions of cities with respect to claims which may be made under the Compensation Act are superseded by its provisions, the title of the act being broad enough to include municipal corporations that are employers.

2. MASTER AND SERVANT—WORKMENS COMPENSATION ACT—NOTICE OF INJURY.

Under Workmen's Compensation Act, pt. 2, §18, providing that want of written notice shall not be a bar to proceedings under the act, if it be shown that the employer had notice or knowledge of the injury, where a street employe was injured and informed the superintendent of public works of the city, who had charge of work on the streets, the latter mentioning the matter to the board of public works, so that all city officials had notice of the injury, the employe was not barred from obtaining compensation under the act by his failure to give written notice within three months.

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Certiorari to Industrial Accident Board.

Proceedings under the Workmen's Compensation Act by William Purdy to obtain compensation for personal injuries, opposed by the City of Sault Ste. Marie, the employer. Compensation was awarded by arbitrators the award approved by the Industrial Accident Board, and the employer brings certiorari. Affirmed.

F. T. McDonald, of Sault Ste. Marie, for appellant.

Lawson C. Holden and *John A. McMahon,* both of Sault Ste. Marie, for appellee.

OSTRANDER, J. The claimant, Purdy, was employed by the city of Sault Ste. Marie as a street sweeper. He was run down and injured by a conveyance using the street. An award by arbitrators, approved by the Industrial Accident Board, is questioned in this proceeding, the contentions of the city being:

"I. Act No. 10, Public Acts of 1912, Extra Session, does not apply to municipalities, and appellant is not subject to its provisions.

"II. Said Act No. 10 is compulsory as applied to municipalities and therefore in violation of Article II, Section 1, of the Constitution of Michigan.

"III. To compel payment of compensation under said Act would deprive appellant of its property without due process of law.

"IV. Said Act makes municipalities insurers of its employes and compels payment of compensation whether or not the injury is the result of any negligence on the part of the municipality.

"V. The legislature is without constitutional power to enact such a compensation act as applying to municipalities.

"VI. The award cannot be sustained because no claim for compensation or notice of injury was presented to or filed with the appellant as required by Act No. 10, Public Acts of 1912."

In argument it is said that the city is governed by a charter granted by the legislature and, pointing out its provisions relating to the presenting, allowance and payment of claims against it, no authority is to be found for the payment of the award; that the compensation act, so-called, contains no provision for paying the award; that the title to the said com-

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pensation act does not give notice of any intention to supersede the charter.

In *Wood* v. *City of Detroit*, decided herewith, this point was not presented, and is not referred to in the opinion. However in considering that case we had the advantage of the briefs in the case at bar and are of opinion that the charter provisions of cities with respect to claims which may be made under the act here in question are superseded by the provisions of the act. Section 5 of part 6 of that act expressly repeals "All acts and parts of acts inconsistent with the act" and "replaced by this act." The title of the act mentions and indicates that its provisions relate to "liability of employers for injuries or death sustained by their employes." It is general, as titles of acts must be, and is broad enough to include municipal corporations if they are employers. Our view of the act, as expressed in the opinion in *Wood* v. *City of Detroit*, answers the contention that the plaintiff in certiorari may not provide the funds necessary to pay awards made under the act. The other points, except the last, are answered in the earlier opinion.

Upon the last point, we have reviewed the testimony. The claimant was hired by Patrick Brady, who was superintendent of public works of the city. He had charge of work on streets. Mr. Brady saw claimant the second or third day after the injury at the hospital and was told by claimant that while sweeping the street a "rig" ran over him. Mr. Brady mentioned the matter to the board of public works, consisting of the mayor and two members appointed by the council, and in a general way the matter was discussed. An alderman of the city heard of the injury, called at claimant's house and told claimant he would take the matter up with the council. He referred to the case in the council, but made no motion. The first written notice of a claim for compensation was addressed to Mr. Brady as "City Commissioner," is dated April 22, 1913, was served upon Mr. Brady on or about that date, and recites that the injury occurred September 25, 1912. It was brought into the office of the city recorder by some woman May 5, 1913, and left there without any oral statement. It

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was laid before the council the evening of that day and referred to the city attorney for a report. On May 19 the attorney filed his report. It is conceded that he reported non-liability of the city. Later, on December 1, 1913, a copy of a notice of application to the Industrial Accident Board was served upon the city. Objection was duly made by the city before the arbitration committee to arbitrating the claim. Upon an appeal from the award of the committee the board, upon a transcript of the testimony and the objections thereto made by the city, affirmed the award. To the arbitration committee the city objected to the arbitration "on the ground that no notice of injury was served on it." The committee disposed of the point, as appears by a written opinion, in the following manner:

"The Act in question provides for notice being served upon the city within three months after the happening of the injury, and notice of a claim for damages under the Act within six months after death or the removal of physical or mental incapacity. Section 18 of the Act provides: 'Want of written notice shall not be a bar to proceedings under this Act, if it be shown that the employer had notice or knowledge of the injury.'

"The testimony discloses that the city officers and members of the common council generally had notice of the injury, in ample time. That no specific notice was officially served upon them until after the expiration of three months must, I think, also be determined from the evidence.

"However, the object of a notice is to prevent fraud and to permit the city authorities to collect its evidence before the parties having knowledge of the same are scattered and this knowledge lost.

"I think that it has been sufficiently shown that the city, in its official capacity, and nearly all of the city officers (including the board of public works), had knowledge of the injury, and more or less desultory consultation and conferences had respecting it. I believe this notice to be sufficient. The claim for injury was filed, or left with the recorder, within six months from the date of the injury."

Upon the subject of notice of injury the statute, in Part II, provides:

"Sec. 15. No proceedings for compensation for an injury under this act shall be maintained, unless a notice of the injury shall have been given to the employer three months after the happening thereof, and

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unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or, in case of the death of the employe, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity.

"Sec. 16. The said notice shall be in writing, and shall state in ordinary language the time, place and cause of the injury; and shall be signed by the person injured, or by a person in his behalf, or, in the event of his death, by his dependents or by a person in their behalf.

"Sec. 17. The notice shall be served upon the employer or an agent thereof. Such service may be made by delivering said notice to the person on whom it is to be served, or leaving it at his residence or place of business, or by sending it by registered mail addressed to the person or corporation on whom it is to be served, at his last known residence or place of business.

"Sec. 18. A notice given under the provisions of this act shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury, unless it is shown that it was the intention to mislead, and the employer, or the insurance company carrying such risk, or the Commissioner of Insurance, as the case may be, was in fact misled thereby. Want of such written notice shall not be a bar to proceedings under this act, if it be shown that the employer had notice or knowledge of the injury."

The notice referred to in section 16, is, clearly, the notice required by section 15 to be given. The word "within" must be supplied in section 15, making the section read:

"unless a written notice of the injury shall have been given to the employer *within* three months after the happening thereof."

No such notice was given. It is apparent, however, that the employer had notice and knowledge of the injury within the shortest period named in the act and, giving effect to section 18 in accord with the evident legislative intent, the claimant was not barred this proceeding.

It follows that there is no error and that the award must be affirmed.

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The case of MARY WOOD VS. CITY OF DETROIT, cited in the Purdy case, and which discusses at length the objections made to the constitutionality of the law on account of it being mandatory as to cities and municipalities, is here given in full:

SUPREME COURT.

MARY WOOD,
Claimant and Appellee,
vs.
CITY OF DETROIT,
Defendant and Appellant.

CONSTITUTIONAL LAW—WORKMEN'S COMPENSATION ACT—APPLICATION TO MUNICIPALITIES—EQUAL PROTECTION OF LAW.

The Workmen's Compensation Act (Act No. 10, Public Acts of 1912), as amended by Act No. 50, Public Acts of 1913, providing that the state and each county, city, township, incorporated village, and school district, and each incorporated public board or public commission in the state, authorized by law to hold property and to sue or be sued generally, shall constitute an employer subject to the provisions of the act, is not violative of Const. art. 8, §§ 20-24, providing, generally, that the Legislature shall provide by a general law for the incorporation of cities, that under such general law the electors of each city and village shall have power to frame and amend its charter and to pass all laws and ordinances relating to municipal concerns, that any city or village may acquire and maintain parks, hospitals, etc., and all works involving the public health or safety, that subject to the Constitution any city or village may acquire and operate public utilities, etc., and that when a city or village is authorized to acquire or operate any such utility it may issue bonds, since the compensation act, in its application to municipalities, involves and touches upon no right of local self-government or local control and management of corporate property, because in effect it declares a new public purpose for which taxes may be levied by the municipality, i. e., to compensate injured employes, and so does not deprive the municipality of its property, authorized by the Constitution to be held by it.

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The classification of employers as municipal or otherwise by the Legislature in the Workmen's Compensation Act (Act No. 10, Public Acts of 1912) as amended by Act No. 50, Public Acts of 1913, giving private employers an election whether or not to accept the act, while imposing it upon municipal employers, is not unconstitutional, as denying equal protection of the laws, since the imposition of the law upon municipalities works no invasion of private rights, as the burden assumed by such corporations is distributed immediately and finally upon the community subject to be taxed to raise the funds necessary to compensate the injured workmen.

Certiorari to the Industrial Accident Board to review the action of the Board in granting an award to Mary Wood, as compensation for the death of her husband, while in the employ of the city of Detroit. Affirmed.

Louis H. Wolfe and *Chester L. Schwartz,* (*Maurice E. Fitzgerald and Samuel W. Shier,* of counsel), all of Detroit, for claimant.

William E. Tarsney, (*Richard I. Lawson,* of counsel), of Detroit, for respondent.

Grant Fellows, Attorney General; *L. S. Carr,* Assistant Attorney General, both of Lansing, amici curiae.

OSTRANDER, J. In March, 1914, an employe of the Public Lighting Commission of the city of Detroit in the course of his employment was killed. The Industrial Aclident Board affirmed an award to a member of the family of the deceased made under the provisions of Act No. 10 of the Public Acts of the Extra Session of 1912, overruling the contention of the city that, as applied to municipal corporations, the act is void. The act is entitled:

"An Act to promote the welfare of the people of this State, relating to the liability of employers for injuries or death sustained by their employes, providing compensation for the accidental injury to or death of employes and methods for the payment of the same, establishing an industrial accident board, defining its powers, providing for a review of its awards, making an appropriation to carry out the provisions of this act, and restricting the right to compensation or damages in such cases to such as are provided by this act."

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The proposition of plaintiff in certiorari are that the effect of the act, in operation, is to deprive it of its property without due process of law, the Legislature being without power to compel it to respond in damages to an employe injured without its fault; that by the terms and operation of the law and in respect to its private and proprietary functions and powers its rights and the similar rights of individuals and of private corporations are not equally protected. It is also contended that in the Home Rule Act the Legislature exhausted its powers and may not by the act in question affect municipal affairs as it has assumed to do.

On the other hand, the claimant, the defendant in certiorari, presents points which are stated in the brief as follows:

"(1) That Act No. 10, Public Acts 1912, Extra Session, is constitutional and is within the police power of the State; and that the State has absolute control of municipalities.

"(2) That the Legislature in passing Act No. 279 in 1909, known as the Home Rule Bill, did not relinquish its control or its further guidance or restrictive powers as to municipalities; that the provision in the constitution made in 1908 in which it is stated that the legislature shall provide a general law for the incorporation of cities and villages with reference to the rate of taxation for municipal purposes and restricting their powers to borrow money and contracting debts did not prevent the legislature from passing a law such as Act No. 10 of the Public Acts of 1912, Extra Session.

"(3) The appellee contends that municipalities, such as cities, villages, towns, townships, and counties are not discriminated against in Act No. 10 of the Public Acts of 1912, Extra Session; that the Legislature did not exceed its authority in passing a measure which compels an employer (Municipality) to pay money to an employe who is injured while within the scope of his employment, whether or not the employer (Municipality) is negligent in any degree."

A Workmen's Compensation Act has been held to be invalid, because compulsory, in *Ives* v. *South Buffalo Ry Co.*, 201 N. Y. 271, and valid, though compulsory, in State *ex rel Davis-Smith Co.* v. *Clausen,* Wash. 117 Pac. Rep. 1101. The New York decision was made in March, 1911. In November, 1913, the constitution of New York was amended (Art. 1, Sec. 19), and it has since been held, *Jensen* v. *Southern Pac. Co.*,

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109 N. E. Rep. 600, that the constitutional amendment meets the objections suggested by the court and sustains the present act, which differs essentially from the one considered in the Ives case. See, also, *State ex rel. Yaple* v. *Creamer*, 85 Ohio St. 349, and *Porter* v. *Hopkins*, 109 N. E. Rep. 629. The broad question discussed in the cases referred to is not before us. The questions here are whether the Legislature may impose the obligation upon a municipal corporation and, if it may, then whether the act discriminates, unlawfully, between such corporations and others affected by the act.

It is well to inquire what will be the effect of the law in application to actual affairs, and especially in what way, if in any, it affects differently, municipal corporations and private corporations and individuals.

Excepting employers of domestic and farm labor, the act abolishes certain defenses in actions for personal injuries as to all employers, in all cases except cases where an employe gives notice that he will not be bound by the act. These defenses are available to an individual or a private corporation in a suit brought by an employe who has so given notice. In no case are they available to a municipal corporation, because its employes are in any event, in express terms, bound by the act. The defenses referred to are (1) that the employe was negligent, unless wilfully so, (2) that the injury was caused by the negligense of a fellow servant, (3) that the employe had assumed the risks inherent in, incidental to, or arising out of his employment, or arising from failure of the employer to provide and maintain safe premises and suitable appliances.

Probably no one will now deny the power of the Legislature to abolish these defenses. See, Opinion of Justices (Mass.), 96 N. E. 308; Ives v. S. B. R. Co., 201 N. Y. 271; Quackenbush v. Wis. & Minn. R. Co., 62 Wis. 411; Quackenbush v. Wis. & Minn. R. Co., 71 Wis. 472; Employers' Liability Cases, 207 U. S. 463; Kiley v. C., M. & St. P. R. Co., 138 Wis. 215; Wilmington Star M. Co. v. Fulton, 205 U. S. 60; Minnesota I. Co. v. Kline, 199 U. S. 593; Hall v. West & S. M.

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Co., 39 Wash. 447; Johnson v. So. Pac. Co., 196 U. S. 1; Walker v. C. C. R. Co., 135 N. C. 738; Mott v. Southern R. Co., 131 N. C. 234; Cogdell v. Southern R. Co., 129 N. C. 398; Thomas v.R. & A. A. L. R. Co., 129 N. C. 392; Carterville C. Co. v. Abbott, 181 Ill. 495; Odin C. Co. v. Denman, 185 Ill. 413; D. H. Davis C. Co. v. Polland, 27 Ind. App. 697; Island C. Co. v. Swaggerty, 159 Ind. 664; U. S. C. Co. v. Cooper, (Ind. App.) 82 N. E. 981; Hailey v. T. & P. R. Co., 113 La. 533; Kilpatrick v. G. T. R. Co., 74 Vt. 288; Johnson v. Mammoth Vein C. Co., 88 Ark. 243; Coley v. N. C. R. Co., 129 N. C. 407; Lore v. American Mfg. Co., 160 Mo. 608; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35; Ditberner v. C., M. & St. P. R. Co., 47 Wis. 128; Mo. Pac. R. Co. v. Haley, 25 Kan. 35; Mo. Pac. R. Co. v. Mackey, 33 Kan. 298; Bucklew v. C.I. R. Co., 64 Iowa 603; McAunich v. M. & M. R. Co., 20 Iowa, 338; Vindicator C. G. M. Co. v. Firstbrook, 36 Colo. 498; Deppe v. C., R. I. & P. R. Co., 36 Iowa, 52; Pierce v. Van Dusen, 78 Fed. 693; Campbell v. Cook, 86 Tex. 630; Thompson v. Central R. & B. Co., 54 Ga. 509; Georgia R. Co. v. Ivey, 73 Ga. 499; Mo. Pac. R. Co. v. Castle, 172 Fed. 841; Mo. Pac. R. Co. v. Mackey, 127 U. S. 205.

But abolishing these defenses, except as against an employe who refuses to be bound by the act, is not the sole, nor main, purpose of the act. Obviously, it is an inducement, somewhat coercive in character, for accomplishing what the legislature regarded as a desirable result. With the particular defenses abolished, there would still be actions in which the liability of the employer would be debatable and many injuries of employes are attributable to pure accident. The individual and the private corporation employing labor, and refusing to be bound by the act, may elect to contest, though with limited defenses, liability for injuries; municipal corporations may not. In this respect, only, the act affects, differently, municipal corporations and other corporation and individual employers of labor. It expressly provides that

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"the State, and each county, city, township, incorporated village and school district therein, and each incorporated public board or public commission in this State authorized by law to hold property and to sue or be sued generally."

shall constitute employers subject to the provisions of this act. Act No. 50, Public Acts 1913. And no distinction is suggested between employment in work heretofore classified as governmental in character, or involving the exercise on the part of the corporation of governmental power, and employment in work heretofore classified as private in character.

As to the first question presented, namely, the power of the Legislature to impose upon municipal corporations the duties and liabilities created by the act, I think there would have been, under our former constitutions, no reasonable doubt. So long as it was admitted, (People v. Hurlbut, 24 Mich. 44; Board of Park Commissioners v. Common Council of Detroit, 28 Mich. 228), that the State, through the Legislature, must determine for each of its municipal corporations the powers it should exercise and the capacities it should possess and that it must also decide what restrictions should be placed upon them,

"as well to prevent clashing of action and interest in the state, as to protect individual corporators against injustice and oppression at the hands of the local majority,"

it followed that municipal activity in the employment of labor, if permitted at all, might be permitted only upon compliance with such conditions as are found in the act here considered. In Atkin v. Kansas, 191 U. S. 207, there was involved the validity, with respect to the fourteenth amendment to the constitutiton of the United States, of a statute of Kansas which, after fixing eight hours as a day's work for all laborers employed by or on behalf of the state, or any of its municipalities, made it unlawful for any one contracting to do any public work to require or permit any laborer to work longer than eight hours per day and required contractors to

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pay the current rate of daily wages, which it appeared were fixed, as to private work, upon ten hours' daily labor. A contractor was convicted and sentenced for disobedience of the act. In the opinion of the court, it is said, among other things:

"'If a statute,' counsel observes, 'such as the one under consideration is justifiable, should it not apply to all persons and to all vocations whatsoever? Why should such a law be limited to contractors with the State and its municipalities? * * * Why should the law allow a contractor to agree with a laborer to shovel dirt for ten hours a day in performance of a private contract, and make exactly the same act under similar conditions a misdemeanor when done in the performance of a contract for the construction of a public improvement? Why is the liberty with reference to contracting restricted in the one case and not in the other?'

"These questions—indeed, the entire argument of defendant's counsel—seem to attach too little consequence to the relation existing between a State and its municipal corporations. Such corporations are the creatures, mere political subdivisions, of the State for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the State. They are, in every essential sense, only auxiliaries of the State for the purposes of local government. They may be created, or, having been created, their powers may be restricted or enlarged, or altogether withdrawn at the will of the legislature; the authority of the legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed."

But it is argued, in effect at least, and the point is self-intruding into any discussion of the subject, that the constitution of 1909 has taken from the Legislature the power to grant or refuse to municipal corporations the exercise of certain powers and the possession of certain capacities, and so has denied the power of the Legislature to restrict and control provident and necessary action of municipalities in exercising powers which the constitution itself has given to them. In other words, the so-called private capacities of municipal corporations enumerated in the constitution may be employed precisely as like capacities and activities of private corpora-

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tions may be employed in so far as legislative control is concerned.

In a recent case, in considering the right of a city while operating its electric light plant and supplying its inhabitants with current to also in that connection do electrical wiring on private premises and furnish fixtures and other accessories essential and convenient in using electricity, and sustaining the right, we said:

"The old law of municipal trading, involving the propriety and expediency of authorizing a municipality to engage in general business in competition with its citizens conducting a private business of like kind, has little bearing here, but the rule remains that taxation can only be for public purposes and municipalities have no express or implied power to engage generally in private business. We are past the general question of the validity of legislation authorizing municipal ownership and operation of plants and their necessary equipment to furnish the concentrated population of cities with certain general needs and conveniences, like water, light, heat, transportation, telephone service, etc., and it is held that the court will not interfere with any reasonable exercise of the implied powers to operate such plants in a business way, and as any private corporation could or would." *Andrews* v. *South Haven*, 22 D. L. N., 689.

The constitution of 1909 contains the following:

Article VIII:

"Sec. 20. The legislature shall provide by a general law for the incorporation of cities, and by a general law for the incorporation of villages; such general laws shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts.

"Sec. 21. Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter, and, through its regularly constituted authority, to pass all laws, and ordinances relating to its municipal concerns, subject to the constitution and general laws of this state.

"Sec. 22. Any city or village may acquire, own, establish and maintain, either within or without its corporate limits, parks, boulevards, cemeteries, hospitals, almshouses and all works which involve the public health or safety.

"Sec. 23. Subject to the provisions of this constitution, any city or village may acquire, own and operate, either within or without its

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corporate limits, public utilities for supplying water, light, heat, power and transportation to the municipality and the inhabitants thereof; and may also sell and deliver water, heat, power and light without its corporate limits to an amount not to exceed twenty-five per cent of that furnished by it within the corporate limits; and may operate transportation lines without the municipality within such limits as may be prescribed by law: Provided, That the right to own or operate transportation facilities shall not extend to any city or village of less than twenty-five thousand inhabitants.

"Sec. 24. When a city or village is authorized to acquire or operate any public utility, it may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law: Provided, That such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such city or village, but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure."

The general law passed pursuant to the constitutional provision is Act No. 279, Public Acts of 1909, amended in some respects by Act No. 203, Public Acts of 1911, and by Act No. 5, Public Acts of 1913. Of this legislation it may be said, generally, that it recognizes and provides for the exercise of the right of cities to acquire and control property in accordance with their charters, which they may make, revise or amend, within certain limitations. Among other things, the charters may provide:

"(1) For the purchase of the franchises, if any exist, and of property used in the operation of companies or individuals engaged in the plank-road, cemetery, hospital, almshouse, electric light, gas, heat, water and power business; and in cities having not less than twenty-five thousand inhabitants the purchase of the franchise, if any, and the property of street railway and tram railway companies, State and county taxes shall be paid upon such transportation property so purchased and owned by any such city;"

"(s) For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interest of the city, the good government and prosperity of the municipality and its inhabitants, and

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through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns, subject to the constitution and general laws of this State."

The city of Detroit, the plaintiff in certiorari, exists under a special charter, being of the class referred to in section 2 of the act as follows:

"Each city now existing shall continue with all its present rights and powers until otherwise provided by law."

It has, however, as is matter of common knowledge, amended its charter in various respects, not here of importance. It possessed, before the constitution was adopted, various powers relating to the acquisition, ownership and control of property, and still possesses these powers and in their exercise has acquired and owns property, real and personal, which is operated by the city. In the management and control of this property and in the exercise of powers concerning streets and public places, it employs and pays many men.

Counsel for plaintiff in certiorari say:

"If the municipality in its private business capacity is a private corporation, it is then entitled to the same right of election as every other private corporation; and if this Act is compulsory in its features as applied to the municipality, it then compels the municipality to pay its injured employes, and results in the taking away of the municipality's property (its money) without due process of law, for the reason that by due process of law is meant the right to have laws operate on all alike, not subjecting the individuals to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

The constitution of 1909 has pointed out the extent of the local powers and capacities of cities and villages with more precision than was done in former constitutions, thus restricting the power of the Legislature to grant or to deny to particular communities the enumerated capacities and powers, at will, but it has not abolished all distinctions between municipal and other corporations and individuals with respect to the exercises of the powers conferred nor denied the power of

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the Legislature to enact general laws applicable to cities. The distinction between powers governmental in character and those private in character as exercised by municipal corporations does not involve the abrogation of the distinction between private municipal activity and private individual activity. To employ a seeming paradox, private municipal activities are all of them public. What has been called private in municipal activity is, nevertheless public when contrasted with purely private enterprise and adventure.

There remains, and always must remain, the distinction pointed out in the opinion last referred to. The actual basis for the carrying on by municipal corporations of private municipal business is taxation. There is not, and there can not be, any merely local power to tax persons or property, and municipal activity may still be, and it is the command of the constitution that it shall be, restricted, limited, by the limitation of the power to tax, to borrow money and to exploit the municipal credit. Moreover, municipal corporations are still State agencies and as such subject to legislative direction and control, none the less so because the exercise of such control may indirectly affect a private municipal activity. The act, in its application to municipalities, involves no right of local self-government, or local control and management of corporate property. It deprives the municipality of none of its property, because, in effect, it is made lawful to raise by tax the money required to pay all injured employes some compensation. A new public purpose for which taxes may be levied is declared.

The subject of the legislation which is in question here is a social subject, in its very nature referable for community action to the State itself. A social theory needed to be crystallized into law. Its nature was such that no community less than the State could be appealed to for this purpose. The theory of this and of similar legislation includes the essential idea that the industrial worker is himself a social asset and ought not, in any case, to bear the whole result of a personal injury arising out of and in the course of his employment; that

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society at large ought to share the loss. The subject is one of governmental control, of public policy, necessarily committed to the Legislature. Whether it is or is not denominated a police regulation, municipal corporationss are, for the purpose of carrying out such a measure, subject to legislative control. The first question is therefore answered adversely to the plaintiff in certiorari.

The second question, namely, whether the classification of employers as municipal and other can be defended, is, in principle, answered by what has been already said. The legislature was confronted with the duty to devise a plan, complete in itself, for dealing with the subject and accomplishing the desired purpose. The limitation upon its power in this direction is the constitution, which I think it has not contravened. The burden created, if it can be called a burden, is uniform as to each individual of each class. There is no vested right of any person to labor for a municipal corporation.

There is also a consideration of expediency which may have influenced the Legislature. Private corporations and individuals exploit private capital. Out of this, in the first instance, the compensation of employes must be paid. The burden thus assumed by the employer must be distributed by his action in the course of his business. In the case of a municipal corporation the burden assumed by it as employer is distributed, immediately and finally, upon the community subject to be taxed to raise the necessary fund. However that may be, there is found in the imposition of the law upon municipal corporations no invasion of private rights, but only the enforcement of a State policy which, in view of municipal activities, ought to be uniformly accepted and observed by all municipal corporations.

The order of the Industrial Accident Board is affirmed.

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MARYANNA MATWICZUK,
Applicant,
vs.
AMERICAN CAR & FOUNDRY COMPANY,
Respondent.

NOTICE OF CLAIM—POWER OF ATTORNEY.

Applicant's decedent was killed while in respondent's employ. His brother-in-law immediately consulted an attorney who notified respondent of the widow's claim and suggested an early settlement. Decedent's widow lived in Poland and she gave his brother-in-law power of attorney to act for her, which was executed in Poland and received by him more than six months after the date of the injury. Respondent refused to pay compensation on the ground that the brother-in-law had no authority to make the application for compensation and that the power of attorney was given him more than six months after the injury, and therefore he was barred from making such claim.

HELD: 1. That the attorney's letter notifying respondent of the death of decedent was sufficient notice of a claim for compensation.

2. That the power of attorney took effect at the time of mailing rather than at the time of delivery.

Appeal of American Car & Foundry Company from the decision of an arbitration committee awarding compensation to Maryanna Matwiczuk for the death of her husband. Affirmed.

Opinion by the Board:

It is conceded in this case that Joseph Matwiczuk, the husband of the applicant, met his death on May 22, 1913, as a result of injuries received while in the employ of respondent. It is undisputed that the injuries resulting in his death arose out of and in the course of his employment, and that his widow would be entitled to the compensation fixed by law if claim therefor was made within the time fixed by the Compen-

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sation Act. It is undisputed that on the day following the death of deceased, his brother-in-law, Joseph Postinack, consulted an attorney in the city of Detroit, and that said attorney wrote a letter to respondent notifying it of the death of Joseph Matwiczuk and further stating that his death was due to any injury received while working for respondent, that deceased had a wife and four children living in Poland, who were dependent upon him, and closing the letter as follows:

"If you care to offer reasonable compensation in settlement there is no doubt that it will be considered. Awaiting an immediate reply, I remain (Signature)."

The widow of deceased in fact resided in Poland as stated in said notice, and the brother-in-law of deceased above-mentioned assumed to act for her in consulting said attorney and making the aforesaid claim. It is conceded that Postinack at the time he consulted said attorney had not been authorized so to do by the widow, as this was done very shortly after the death and before the widow even had knowledge of the accident, her residence being in a small town in the interior of Poland. It is contended in this case that the claim made through the action of Postinack is a nullity because he was not authorized so to act, and that the letter from said attorney did not constitute the making of a claim for compensation within the meanning of the law.

In the opinion of the Board the provision of the Compensation Law relative to making claims for compensation should not be technically construed, and that the communication which was sent to the employer in this case was sufficient to fairly apprise it of the fact that compensation was claimed for the death of decedent. The essential function to be performed by notice of claim for injury under this law is to bring home to the employer at some time within 6 months after the accident knowledge of the fact that a claim for compensation therefor is being asserted. We think that the letter in question must be held to have fairly apprised respondent of this fact.

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At the time of making the claim, Postinack had not been authorized to act for applicant as before stated, but about 5 months after the death of deceased applicant executed at her home in Poland a written power of attorney authorizing Postinack to act in her behalf in all things relating to the prosecution of her claim for compensation. When this power of attorney reached Postinack in this country a little more than 6 months had elapsed since the death of decedent, and it is contended by respondent that the power of attorney did not take effect until it was actually delivered in this country, and that being after the expiration of the six months period, it could not operate as a ratification of the previous acts of Postinack. This contention is largely technical and without merit. We are inclined to the opinion that the mailing of the power of attorney in Poland constituted a sufficient delivery. We are unable to find any provision in the act requiring the person who makes the claim on behalf of dependents of a deceased workman to be duly authorized agent. It is the evident intention of the Law that such claim may be made by near relatives or friends without formal authorization from the dependents. To hold otherwise would defeat compensation in many cases where the dependents of deceased workmen live in distant lands, or where such dependents are minors. The decision of the committee on arbitration awarding compensation to the applicant is affirmed.

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The decision of the Board in this case was affirmed by the Supreme Court, the following being the opinion filed by said Court:

SUPREME COURT.

MARYANNA MATWICZUK,
Claimant and Appellee,
vs.
AMERICAN CAR & FOUNDRY COMPANY,
Defendant and Appellant.

MASTER AND SERVANT—INJURIES TO SERVANT—RIGHT TO COMPENSATION—COMPLIANCE WITH STATUTES.

Act No. 10, Public Acts of 1912, § 15, Part 2, provides that no proceedings for compensation for injury shall be maintained without notice of the injury within 3 months, and claim for compensation within 6 months, after the injury. Section 16 provides that the notice shall be in writing, in ordinary language, and shall state the time, place, and cause of the injury, and be signed, in the event of the employe's death, by his dependents or others in their behalf. Section 18 provides that want of written notice shall not bar the action, if the employer has notice or knowledge of the injury. Deceased employe had a wife and family in Poland. On his death, and on the next day, his brother-in-law employed an attorney, who wrote a letter notifying the employer of the death at a certain hour and day, that the cause was improper insulation of electric wires, and that deceased had a family in Poland dependent on him, and asking compensation. A power of attorney ratifying such act was executed and mailed in Poland by the wife to the brother-in-law within six months, but reached him after the expiration of that period.

HELD: That, as the statute must not be technically construed, the notice given was sufficient, since it gave the employer full opportunity to investigate the accident.

Certiorari to Industrial Accident Board.

Proceedings under the Workmen's Compensation Act by

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Maryanna Matwiczuk to recover compensation for the death of her husband against the American Car & Foundry Company, employer. On certiorari to review the action of the Industrial Accident Board in confirming an award for the claimant. Affirmed.

L. A. Koscinski, of Detroit, for claimant.

E. D. Alexander, of Detroit, for defendant.

MOORE, J. This is certiorari to review the action of the Industrial Accident Board in confirming an award made in favor of the claimant.

The questions involved are so clearly stated in the opinion rendered by the Board that we quote from it.

"It is conceded in this case that Joseph Matwiczuk, the husband of the applicant, met his death on May 22, 1913, as a result of the injuries received while in the employ of respondent. It is undisputed that the injuries resulting in his death arose out of and in the course of his employment, and that his widow would be entitled to the compensation fixed by law if claim therefor was made within the time fixed by the Compensation Act. It is undisputed that on the day following the death of deceased, his brother-in-law, Joseph Postinack, consulted an attorney in the city of Detroit, and that said attorney wrote a letter to respondent notifying it of the death of Joseph Matwiczuk and further stating that his death was due to an injury received while working for respondent, that deceased had a wife and four children living in Poland, who were dependent upon him, and closing the letter as follows:

"If you care to offer reasonable compensation in settlement there is no doubt that it will be considered. Awaiting an immediate reply, I remain, (Signature)."

"The widow of deceased in fact resided in Poland as stated in said notice, and the brother-in-law of deceased above mentioned assumed to act for her in consulting said attorney and making the aforesaid claim. It is conceded that Postinack at the time he consulted said attorney had not been authorized so to do by the widow, as this was done very shortly after the death and before the widow even had knowledge of the accident, her residence being in a small town in the interior of Poland. It is contended in this case that the claim made through the action of Postinack is a nullity because he was not authorized so to act, and that the letter from said attorney did not

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constitute the making of a claim for compensation within the meaning of the law."

"In the opinion of the Board the provision of the Compensation Law relative to making claims for compensation should not be technically construed, and that the communication which was sent to the employer in this case was sufficient to fairly apprise it of the fact that compensation was claimed for the death of the decedent. The essential function to be performed by notice of claim for injury under this law is to bring home to the employer at some time within six months after the accident knowledge of the fact that a claim for compensation therefor is being asserted. We think that the letter in question must be held to have fairly apprised respondent of this fact."

"At the time of making the claim, Postinack has not been authorized to act for applicant as before stated, but about five months after the death of deceased, applicant executed at her home in Poland a written power of attorney authorizing Postinack to act in her behalf in all things relating to the prosecution of her claim for compensation. When this power of attorney reached Postinack in this country a little more than six months had elapsed since the death of decedent, and it is contended by respondent that the power of attorney did not take effect until it was actually delivered in this country, and that being after expiration of the six months' period, it could not operate as a ratification of the previous acts of Postinack. This contention is largely technical and without merit. We are inclined to the opinion that the mailing of the power of attorney in Poland constituted a sufficient delivery. We are unable to find any provision in the act requiring the person who makes the claim on behalf of the dependents of a deceased workman to be a fully authorized agent. It is the evident intention of the law that such claim may be made by near relatives or friends without formal authorization from the dependents. To hold otherwise would defeat compensation in many cases where the dependents of deceased workmen live in distant lands, or where such dependents are minors. The decision of the committee on arbitration awarding compensation to the applicant is affirmed."

Counsel for appellant argue two propositions:

1. Was the letter sent by Daniel Minock to the American Car and Foundry Company a claim for compensation such as is contemplated by the terms of the Workmen's Compensation Act?

2. If this letter was a claim sufficient to comply with the terms of the Workmen's Compensation Law, was it sufficiently authorized to be binding upon the American Car and Foundry Company?

Under the first of these propositions it is argued that when

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the attorney sent the letter he was not presenting a claim under the compensation law, but had in mind liability under the common law for negligence.

Under the second proposition it is urged that the power of attorney did not take effect until after the six months had expired, and that as the claimant could not file a claim at that time she could not ratify what had been done before.

It is also claimed that the power of attorney related to the future and not to what had already been done. Counsel for appellant admit that the propositions involved in this case are new and therefore undecided.

It may be helpful to quote in full the letter which was sent:

"Detroit, Mich., May 22, A. D. '13.

American Car and Foundry Co.,
Gentlemen:

Joseph Pasternack, who resides at No. 621 Palmer Ave., this city, informs me that his brother-in-law was killed while working in your employ about 1 p. m. Wednesday, May 21st, A. D. 1913.

He claims that his brother-in-law, whose name is Joseph Natfechuck, was working on an electric drill, that the electric wires were not properly insulated and that the wires were lying in water, that owing to the fact that when this man came in contact with the wires he received a shock through his body which finally caused his death.

This man is married and his wife and four children are living in Poland and are and were dependent on him for their support and maintenance.

If you care to offer a reasonable compensation in settlement there is no doubt that it will be considered.

Awaiting an immediate reply, I remain,

(Sgd) Daniel L. Minock."

The record discloses that the claimant was advised of the death of her husband. It does not appear whether she was advised of the sending of the letter just quoted. On October 28, 1913, she executed before a Notary Public a formal power of attorney authorizing her brother Joseph Postinack to look after her claim growing out of the death of her husband, the concluding part of the power of attorney reads as follows:

"Said Mary Matwiczuk hereby consents to and agrees with everything that said Joseph, son of Michael Pasternak, her duly appointed

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attorney in fact, or his duly selected attorneys, may legally do or perform, and she further ratifies any of their actions."

By due course this power of attorney reached her brother, Joseph Posternak, though not until more than six months after the death of her husband.

We may now consider the compensation law, Act 10, Public Acts, 1912. The provisions of the compensation law applicable are Section 15, of Part II which reads:

"No proceedings for compensation for injury under this act shall be maintained unless a Notice of the Injury shall have been given to the employer three months after the happening thereof, and unless the Claim For Compensation with respect to such injury shall have been made within six months after the occurrence of the same, etc."

and Section 16 which reads:

"The said Notice shall be in writing and shall state in ordinary language the time, place and cause of the injury and shall be signed by the person injured or by a person in his behalf, or in the event of his death by his dependents or by a person in their behalf."

Section 18 provides:

"Want of such written notice shall not be a bar to the proceeding if it be shown that the employer had notice or knowledge of the injury."

See *Purdy* vs. *City of Sault Ste. Marie,* in which an opinion was handed down this term.

It is clear that what was done gave the employer notice of the injury thus affording an opportunity for a full investigation. It also gave notice of who were dependents. We think it also is clear that the company was informed that the brother-in-law by employing the attorney who wrote the letter giving this information, was seeking to protect the interests of the widow and minor children who were in Poland, and the inference follows almost as of course that a claim was urged in their behalf growing out of the death of the husband and father.

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The language of the Statute indicates that the notice and claim might be in ordinary language and might be signed by dependents "or by a person in their behalf," and what would be more natural than to assume that a brother of the widow in her absence would act for her.

What was done gave to the employer every opportunity to investigate the accident, and knowledge of all material things relating thereto as fully as though an application had been made in a formal way by the widow upon the day when the letter was written.

The next day after the injury the employer was notified of it, the result of it, the time and place and cause of its happening and of the persons who were dependent. This notice was given not by an outsider but through the agency of the brother-in-law of the deceased, the brother of the widow. What was done was notice of a claim by the deceased's dependents made by a person in their behalf. We think it too technical to say that a notice and claim made within twenty-four hours after the accident caused to be given as in this case in behalf of the widow who could not make the claim herself because of the distance from where she lived, which action was ratified by her on being advised of the situation, must fail because the ratification did not reach this country within six months from the time of the accident, to so hold would not be according to the letter or the spirit of the employers' Liability Act.

The action of the Industrial Board is affirmed.

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WILLIAM M. AGLER,
Applicant,
vs.
MICHIGAN AGRICULTURAL COLLEGE,
Respondent.

CASUAL EMPLOYMENT—CONSTITUTIONAL BODIES.

Applicant was employed by the Michigan Agricultural College to make some repairs on the roofs of some of its buildings. He was not a regular employe of the college, but was merely called upon as his services were needed. While engaged in one of these jobs, he fell and received injuries which incapacitated him for a long period. Compensation was refused because it was contended that under sub. 2 of sec. 7, Part I, of the Compensation Law he was a casual employe. Also that the Michigan Agricultural College is a constitutional body, not subject to legislative control and therefore not liable to pay compensation in any case of injury.

HELD: 1. That the proviso of sub. 2, of sec. 7, excluding those "whose employment is but casual," does not apply to employes of the state or of municipal corporations within the state.

2. The Michigan Agricultural College is subject to the general laws of the state with reference to its liability to others.

Opinion by the Board.

In the summer of 1912, the applicant, Willis M. Agler, was employed by the Michigan Agricultural College to repair the tin, metal and slate portions of roofs and porticos of the buildings on the college grounds for a period of nearly three months, receiving for his work 40 cents per hour. This was the first work Agler had ever done for the college, and at its conclusion no arrangement was made with him for any further work. In the spring of 1913, the heavy winds injured some of the tin work on some of the porticos of the college buildings and Agler was employed to repair the same, he to do the work at 40 cents per hour, the same as the previous summer. Mr. Agler is a tinner and roofer by trade, but does not

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maintain a regular shop or place of business, except that he has a room in his basement where his tools and stock are kept and where some of his work is done. He was accustomed to take such work and jobs in his line as he could procure, working generally by the hour, and when he undertook to make the repairs on the porches in question he knew it would require but two or three days' work for himself and a helper. He knew that he was subject to the direction of the proper officials of the college and could be discharged by them at any time. The college furnished the material for making the repairs, Mr. Agler only furnishing part of his tools. Altogether the college has about 60 buildings and employs on an average 125 employes in and about the grounds and buildings in addition to the faculty of the college. It does not employ regularly tinners or roofers.

On April 18, 1913, while Mr. Agler was engaged in making the repairs above referred to, he fell from a ladder, fracturing his left leg. The injury will probably not result in permanent disability, but it may be a considerable time before the injured leg will be as well as prior to the injury. Had it not been for the accident Mr. Agler would have finished the work that afternoon, the total amount of time required in completing the work being 41 hours for two men or something over 20 hours each. The respondent contends that it is not liable to pay compensation because the work in which Mr. Agler was engaged when injured was casual employment.

This involves the construction of Section 7, Part 1 of the Compensation Law, which is as follows:

"The term 'employe' as used in this act shall be construed to mean:

1. Every person in the service of the state or of any county, city, township, incorporated village or school district therein, under any appointment, or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, township, incorporated village or school district therein.

2. Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work under the laws of the state who, for the purposes of this act, shall be considered the

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same and have the same power to contract as adult employes, but not including any person whose employment is but casual or is not in the usual course of the trade, business, profession or occupation of his employer."

The next section of the act, being Section 8 of Part I, provides "any employe as defined in subdivision one of the preceding section shall be subject to the provisions of this act and of any act amendatory thereof." The remainder of Section 8 provides in detail that any employe mentioned in subdivision two of the preceding section shall become subject to the provision of the act by his employer accepting the same, and the failure of such employe to make his election not to be subject to the act. It seems clearly apparent from these provisions that two distinct classes of employes are created, one of the said classes being defined by subdivision one, and the other by subdivision two of said Section 7. The Agricultural College being a state institution, its employes are in the service of the state within the meaning of the act and fall within the class of employes defined in subdivision one above quoted. The proviso which excludes from the benefit of the compensation law those "whose employment is but casual" is found only in subdivision two of said section and applies only to the class of employes defined in said subdivision two. It does not apply to employes of the state or of municipal corporations within the state.

At the re-hearing of this case on appeal to the full Board, the point was raised by respondent for the first time that it is a constitutional body not subject to legislative control, and for that reason is not liable to pay compensation in this or any other case. In support of this contention the cases of Bauer vs. State Board of Agriculture, 164 Michigan 415, and Board of Regents vs. Auditor General 167 Michigan 444 are cited. We have examined the above authorities and carefully considered respondent's claim, and have reached the conclusion that the position taken in untenable. The authorities referred to do not go to the extent of holding that respondent is not subject to the general laws of the state, or that it may

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repudiate its obligations because it is a constitutional body. The substance of the above authorities is that, being a constitutional body with certain powers and functions granted and fixed by the constitution, it may determine the purpose and manner of expending its funds, and that the legislature may not interfere with or abridge such right. The precise question decided in the Agricultural College case was that the Board might use its funds to construct a building in East Lansing to be leased to the United States Government for a Post Office, and that such action by the State Board of Agriculture in expending its funds could not be interfered with by the Auditor General or the Legislature. This is a very different question from the one now before us for determination. The State Board of Agriculture is a corporate body, an artificial person, and even though it be of a high class because created by the constitution, it is subject to the general laws of the state, is protected by such general laws as to its property, its contracts, and the liabiliy of others to it; and it is subject to the general laws of the state with reference to its liabilities to others. It is conducting a large enterprise having some 60 buildings, 125 employes besides its corps of professors, teachers and instructors. It exists by virtue of the laws of Michigan, is protected by such laws, and is subject to such laws in all general matters. The award of the committee on arbitration is affirmed.

The above case was appealed to the Supreme Court and reversed on the ground that the State Board of Agriculture, (Agricultural College), is a constitutional body, and not subject to general legislative control, and not having elected to come under the provisions of the Workmen's Compensation Law, the Michigan Agricultural College is not subject to its terms. The question raised on the hearing before the Board and discussed in the Board's opinion as to the applicability of the provision of the Compensation Act relating to casual employment to cases where a municipality is the employer, is not discussed in the opinion of the Supreme Court, and the

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Board's position upon the point is not disturbed. The following is the opinion of the Supreme Court in the case:

SUPREME COURT.

WILLIAM AGLER,
Applicant,
vs.
MICHIGAN AGRICULTURAL COLLEGE,
Respondent.

1. COLLEGES AND UNIVERSITIES—CONSTITUTIONAL LAW—MICHIGAN AGRICULTURAL COLLEGE—MASTER AND SERVANT—WORKMEN'S COMPENSATION.
Neither the legislature nor any officer or Board of the State may interfere with the affairs and property of the university or the Michigan Agricultural College, although in making appropriations for its support the legislature may attach any conditions that it deems expedient, and the appropriation cannot be received without complying with the expressed conditions.

2. SAME—MUNICIPAL CORPORATIONS.
Not having elected to be brought within the provisions of the workmen's compensation law, Act No. 10, Extra Session 1912 (2 How. Stat. (2d Ed.) § 3939 *et seq.*), the Michigan Agricultural College is not subject to its terms.

3. SAME—MASTER AND SERVANT.
A servant of the college or of the State Board of Agriculture is not a servant of the State, within the meaning of the statute.

William M. Agler applied to the Industrial Accident Board for compensation for injuries received while in the employ of the Michigan Agricultural College. An order awarding compensation is reviewed by the respondent on certiorari. Submitted April 24, 1914. Reversed July 24, 1914.

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Grant Fellows, Attorney General, and *L. W. Carr,* Assistant Attorney General, for appellant.

Person, Shields & Silsbee, for appellee.

The applicant, who is a tinner and roofer by trade, was injured, on April 18, 1913, by falling from a ladder while making repairs on the buildings of the respondent. A claim was presented against the respondent under the workmen's compensation law of 1912, and the case is brought here by certiorari to the Industrial Accident Board to review an order affirming the award made to the applicant by an arbitration committee, in accordance with the provisions of the act. Neither the Michigan Agricultural College nor the State board of agriculture, which has general supervision of the college and direction and control of all its funds, elected to come under the provisions of the Workmen's Compensation Act. No mention is made in the act of either of the constitutional boards; the board of regents of the University and the State board of agriculture, and the question here it, Does the act bring arbitrarily under its provisions the State board of agriculture, which is a board created by the Constitution (sections 7 and 8, art. 11, Const.)? This involves a consideration of the following sections of the act:

"PART 1.

"SEC. 5. The following shall constitute employers subject to the provisions of this act:

"1. The State and each county, city, township, incorporated village and school district therein;

"2. Every person, firm and private corporation, including any public service corporation, who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employee for which compensation under this act may be claimed, shall in the manner provided in the next section, have elected to become subject to the provisions of this act, and who shall not, prior to such accident, have effected a withdrawal of such election, in the manner provided in the next section.

* * *

"SEC. 7. The term 'employee' as used in this act shall be construed to mean:

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"1. Every person in the service of the State, or of any county, city, township, incorporated village or school district therein, under any appointment, or contract of hire, express or implied, oral or written, except any official of the State, or of any county, city, township, incorporated village or school district therein: *Provided*, that one employed by a contractor who has contracted with a county, city, township, incorporated village, school district or the State, through its representatives, shall not be considered an employee of the State, county, city, township, incorporated village or school district which made the contract;

"2. Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work under the laws of the State who, for the purposes of this act, shall be considered the same and have the same power to contract as adult employees, but not including any person whose employment is but casual or is not in the usual course of the trade, business, profession or occupation of his employer."

In the stipulation filed in this case the following appears:

"It is agreed that the draft of the workmen's compensation act as prepared by the commission and as presented to the legislature contained a period after the word 'contract' at the end of the first subdivision of paragraph 7 of part 1."

KUHN, J. (*After stating the facts*). By virtue of the Constitution of 1909, the State board of agriculture was put on the same plane with the board of regents of the University of Michigan. It has been established beyond question by decisions of this court that neither the Legislature nor any officer or board of this State may interfere with the control and management of the affairs and property of the University, although in making appropriations for its support the Legislature may attach any conditions it may deem expedient and wise, and the appropriation cannot be received without complying with the conditions. *People, ex rel. Drake,* v. *Regents,* 4 Mich. 98; *Weinberg* v. *Regents,* 97 Mich. 246 (56 N. W. 605; *Sterling* v. *Regents* 110 *Mich.* 369 (68 N. W. 253, 34 L. R. A. 150); *Bauer* v. *State Board of Agriculture,* 164 Mich. 415 (129 N. W. 713); *Board of Regents* v. *Auditor General,* 167 Mich. 444 (132 N. W. 1037).

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Section 5, part 1, of the Workmen's Compensation Law (2 How. Stat. [2d Ed.] § 3939), expressly enumerates the State and counties, cities and villages, townships and school districts. Neither of the constitutional boards is mentioned. In the case of *Weinberg* v. *Regents, supra,* there was under consideration an act of the Legislature which provided:

"That when public buildings, or other public works or improvements are to be built, repaired or ornamented under contract, at the expense of this State, or of any county, city, village, township, or school district thereof, it shall be the duty of the board of officers or agents contracting on behalf of the State, county, city, village, township, or school district, to require sufficient security by bond, for the payment by the contractor, and all subcontractors, for all labor performed, or materials furnished in the erection, repairing or ornamenting of such building, works or improvements." Act No. 45, Pub. Acts 1885.

Mr. Justice Grant, in writing the majority opinion said, 97 Mich., at pages 253, 254 (56 N. W. 607):

"The regents make no contracts on behalf of the State, but solely on behalf of and for the benefit of the University. All the other public corporations mentioned in the Constitution, which have occasion to erect public buildings or to make public improvements, are expressly included in this statute. '*Expressio unius est exclusio alterius.*' It expressly enumerates the State, counties, cities, villages, townships, and school districts. If the University were under the control and management of the legislature, it would undoubtedly come within this statute, as do the Agricultural College, Normal School, State Public School, asylums, prisons, reform schools, houses of correction, etc. But the general supervision of the University is, by the Constitution, vested in the regents. * * *

"The University is the property of the people of the State, and in this sense is State property so as to be exempt from taxation. *Auditor General* v. *Regents*, 83 Mich. 467 [47 N. W. 440, 10 L. R. A. 376]. But the people, who are the corporators of this institution of learning, have, by their Constitution, conferred the entire control and management of its affairs and property upon the corporation designated as 'the Regents of the University of Michigan,' and have thereby excluded all departments of the State government from any interference therewith. The fact that it is State property does not bring the regents within the purview of the statute. The people may, by their Constitution, place any of its institutions or property beyond the control of the legislature."

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The contract of employment in the instant case was made with the State board of agriculture, not on behalf of the State, but primarily for the benefit of the Agricultural College. For the reasons stated by Mr. Justice Grant in the *Weinberg Case*, we must conclude that it cannot be said that the State board of agriculture or the regents of the University are brought under the Workmen's Compensation Act by virtue of said section 5 of part 1 of the act, and it cannot be said that the applicant was an employee of the State within the meaning of said law. The conclusion must therefore follow that the respondent was not within the list of employers who come under the provisions of the law of 1912 automatically; and, inasmuch as the respondent has made no election to come thereunder, the applicant is not entitled to recover in this proceeding.

Because of this conclusion, it is unnecessary to discuss the other interesting and well-argued questions raised in briefs of counsel. The decision of the Industrial Accident Board is reversed, and the claim of the applicant is disallowed.

HELEN JENDRUS,
Applicant,
vs.
DETROIT STEEL PRODUCTS COMPANY,
and
MICHIGAN WORKMEN'S COMPENSATION MUTUAL INSURANCE COMPANY,
Respondents.

REFUSAL TO SUBMIT TO OPERATION—DELAY IN GIVING CONSENT.

Respondent's decedent suffered an injury while in the employ of the applicant, which necessitated an operation. Decedent refused to allow an operation until the next day, although he was told that it was necessary. While the operation was being performed de-

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cedent vomited and some of the vomit was drawn into his lungs, causing pneumonia which resulted in this death.

HELD: The refusal to be operated on when first requested was not so unreasonable as to defeat the claim for compensation, as decedent finally consented when convinced that the operation was absolutely necessary.

Appeal of Detroit Steel Products Company from a decision of an arbitration committee, awarding compensation to Helen Jendrus for the death of her husband. Affirmed.

Opinion by the Board:

In this case the deceased, Joseph Jendrus, was injured by a severe blow on the abdomen. The doctors attending the injured man diagnosed the injury as a probable rupture of the intestine and advised an operation. The accident occurred about 1 o'clock in the afternoon on February 14. At about 8 or 8:30 in the evening the doctors sought to operate on the injured man. It appears that he could not talk English and communication was had with him through an interpreter. The injured man shook his head, indicating a refusal to be operated on. The matter of an operation was again brought up by the doctors on the following morning, February 15. Jendrus, at that time, refused to submit to the operation, but consented at about 11:30 a. m. The operation was performed about 1:30 p. m. on February 15. It seems that during the operation the patient vomited, and vomit was drawn into the lungs, causing pneumonia and resulting in his death a few days later. The operation disclosed a rupture of the intestine which was not sutured, and the post-mortem examination showed the same to be in process of healing at the time of death. All communication with the deceased after the injury was through an interpreter.

The Board is of the opinion that the refusal to be operated on when first requested, and the further action of deceased in delaying consent to the operation until nearly noon on the day

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following the accident was not so unreasonable and persistent as to defeat the claim for compensation in this case. He did submit to the operation after being convinced that it was absolutely necessary. It seems that nearly two hours elapsed from the time he gave his consent till the operation was performed. It is by no means certain that an earlier operation would have saved his life, nor is it certain that the operation actually performed would have have resulted in his recovery were it not for the fact that he vomited while under the anaesthetic and inhaled some of the vomit, causing pneumonia. It seems clear that the operation was not too late to remedy the abdominal injury caused by the accident. The vomiting and resulting pneumonia came as an incident to the operation. The fact that the deceased was unable to speak English and was unaccustomed to the ways of this country should be given some weight.

The judgment and decision of the Arbitration Committee is affirmed.

This case was appealed to the Supreme Court and affirmed, the full opinion of the Supreme Court being given below:

SUPREME COURT.

HELEN JENDRUS,
Claimant and Appellee,
vs.
DETROIT STEEL PRODUCTS COMPANY,
and
MICHIGAN WORKMEN'S COMPENSATION MUTUAL INSURANCE COMPANY,
Defendants and Appellants.

MASTER AND SERVANT—PERSONAL INJURIES—WORKMEN'S COMPENSATION ACT—REFUSAL TO ALLOW OPERATION.

Where a servant of defendant received internal injuries which resulted in peritonitis and he refused to permit an operation which his physician advised, until his condition became too

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serious to operate successfully, but it was not established conclusively that an operation would have effected a cure or that the peritonitis caused his death, and where it was shown that decedent probably died of pneumonia contracted as a result of the operation when he finally submitted to it, 15 or 16 hours later, the court could not determine, as matter of law, that his conduct was so unreasonable as to forfeit the right to compensation under Act No. 10, First Special Session 1912 (2 How. Stat. [2d. Ed.] § 3939), especially in view of the fact that he was unable to speak or understand English well, and was suffering at the time the operation was proposed.

Certiorari to the Industrial Accident Board. Submitted October 16, 1913. Decided December 20, 1913.

Helen Jendrus presented her claim to the Industrial Accident Board for compensation for the accidental death of her husband while he was employed by the Detroit Steel Products Company. From the allowance of the claim, defendants bring certiorari. Affirmed.

Beaumont, Smith & Harris, for appellants.
William W. MacPherson, for appellee.

STONE, J. The claimant and appellee is the widow of Joseph Jendrus, who died on February 19, 1913. Joseph Jendrus, a native of Poland, was on February 14, 1913, an employee of the appellant Detroit Steel Products Company, which was then insured under the Workmen's Compensation Act by the appellant Michigan Workmen's Compensation Mutual Insurance Company. Joseph Jendrus was at the date last named also subject to the Compensation Act. On Friday, February 14, 1913, at about 2 o'clock in the afternoon, Jendrus, while in good health and vigor, was at work for his said employer polishing a spring scroll, when the end of the scroll caught on a belt of a machine, and swung around and struck him violently in the abdomen. Jendrus was immediately placed on a stretcher and sent to Harper Hospital. The insurance company was notified, and its surgeon, Dr. W. H. Hutchings, reached the hospital before the ambulance ar-

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rived. He looked at Jendurs before he was taken into the hospital. Before Jendrus was taken into the ward, samples of his urine and his blood were taken, and he was then put to bed. As soon as this was done, the surgeon examined him, and found "a tenderness, very slight, almost no sign of contusion on the outside, just a little redness." This was on the right side between the ribs and the hip. This was at 2 p. m. A delay was necessary for the blood examination. At 4 o'clock Dr. Hutchings saw Jendrus again. He then complained of much pain, and there was marked muscular rigidity over the area where the blow appeared to have struck. At 8 o'clock p. m. another examination was made. The area of hardness was then spreading. The blood examination had shown no internal hemorrhage, the urine no blood, and the surgeon, with this information diagnosed the case as that of a ruptured intestine. At this hour Jendrus' temperature was rising. The surgeon, to confirm his diagnosis, asked Drs. George McKean and Angus McLean to see the injured man. They each examined him at about 8 o'clock, and confirmed Dr. Hutchings' opinion, and they joined him in saying that an immediate operation was necessary. At this time the claimant and an elderly man were at the bedside of the patient. Jendrus spoke very little English and Dr. Hutchings could not speak Polish. He and the man spoke German, and the doctor explained to him the necessity for an operation. Upon this subject Dr. Hutchings testified before the committee of arbitration as follows:

"I told him that if my diagnosis was correct, that without an operation he was, in my opinion, sure to die; that if he was operated on at that time, he had about nine chances out of ten of getting well. I thoroughly explained that the longer he delayed the operation, the so much worse it was for his chances; that if he delayed long enough, there would be no use of operating. Dr. McLean and Dr. McKean said the same thing. I was not satisfied from the attitude of the man I talked with that he had told him what I said. I was not sure that he did. So I sent down and got one of the maids there who spoke English very well, and who is Polish also, called her in and said to her, 'I want you to tell this man what I say to you.' This was around 8 o'clock. 'You tell him that, if our diagnosis is correct, that if he

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is not operated on, he will surely die.' I said, 'If you are operated on now, as soon as we can, your chances of getting well are about nine out of ten; the longer you delay this, so much you take away from your chances of recovery; if you delay it until you are pretty near dead, probably an operation will do you no good.' This Polish girl explained this to the man, and he said, 'No.' I could see him shake his head. It was apparent from his general attitude that he would not have it, so I went away. * * * I went away leaving instructions, if they changed their minds, they were to call me."

While the doctors were there in consultation, the patient vomited a little fluid. Dr. McLean testified:

"It was fecal in odor, but was not of a poisonous nature."

Dr. McKean testified:

"It was almost a fecal vomit, due to reverse acting of the peritalsis. It was just the beginning of peritonitis. * * * It was approaching the fecal vomiting time."

The patient was kept quiet during the night. The next morning when Dr. Hutchings again saw him he was worse. The doctor testified:

"His pulse was rapid, the whole abdomen was distended and tender, and the typical signs of advanced peritonitis; that is, he was vomiting considerable quantities of fecal matter, which by that time had become markedly fecal."

The patient would not consent in the morning to an operation. Dr. Hutchings went to attend to some other operations. Between 11:30 a. m. and 12 o'clock another physician had been called by the Jendrus family, and he testified that when he arrived Jendrus had consented to be operated upon. Dr. Hutchings testified that it was about 12:30 p. m. when he was told by the nurse that Jendrus had consented to an operation. A room was ordered prepared, and the patient was operated upon at 1:30 p. m. This was as soon as the arrangements could be made. The house staff was present and assisted. There was testimony that the vomiting had grown worse, and it had been persistent all the morning, and the distended con-

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dition of the abdomen had developed about 9 o'clock. Because of the vomiting Dr. Hutchings directed the assistants to use nitrous oxide as the anaesthetic as being less likely to produce vomiting. Just as the patient was going under the influence of the anaesthetic a large quantity of fecal vomitus came up, and some of it went down in his lungs. They turned his head over in the endeavor to rid him of this. The surgeon testified that there was no way that this vomitus getting into the lungs could be avoided. Dr. Hutchings proceeded with the operation, which took about ten minutes. He made the ordinary incision and found a complete peritonitis. The intestines were so congested that he did not attempt to remove them and find the perforation. He inserted drainage in the abdomen, and began transfusing a salt solution subcutaneously. Following the operation Jendrus' condition improved. His temperature went down; the vomiting became less, but his breathing remained rapid. There was trouble about washing out his stomach. He had refused to have this done, but finally consented.

Two days after the operation pneumonia developed, and Dr. Ernest Haass was called. He found the patient suffering from aspiration, or "swallow" pneumonia. This was on Monday. The next two days the lungs solidified, and the patient died of pneumonia, in the opinion of most of the physicians. Dr. McLean, however, testified that, while he saw him but a few times, he did not think he died of pneumonia; he thought it was the peritonitis that was the cause of his death, but testified that he did not see the patient after he had pneumonia. After Jendrus' death a *post mortem* was performed by Dr. Sill, and it confirmed the diagnosis of the surgeon. The lungs were found to be solidified, and Dr. Sill testified, among other things, as follows:

"I think that the pneumonia process discovered was as potent a factor in causing the death as the peritonitis. I would call that what we term the immediate cause of death.

"Q. Was there any way for you to determine whether or not the pneumonia was caused by inspiration of material, of vomitus?"

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"A. Simply that it was a disseminated bronchial pneumonia. * * * The pneumonia process was still active. I mean that the inflammation was going on. I think the man died from toxaemia. I hold from my *post mortem* findings that the pneumonia process was the most active toxic process going on at the time of his death. I form that opinion from the fact that the peritonitis was beginning to localize, beginning to subside. I do not think I could say that the pneumonia was sufficient to have caused death without the complicated inflammation of the peritonitis. The peritonitis and the pneumonia together were sufficient to cause death; but whether the pneumonia alone would have caused death I could not answer. * * * I think the pneumonia was the immediate cause of death. If he had not had pneumonia, he would not have died when he did die, and he might have recovered from his peritonitis.

"Q. Nothing certain about that, about him recovering from the peritonitis?

"A. I could not swear that he would recover; no.

"Q. Are you able to tell from your *post mortem* findings, or are you able to state, which was the greatest factor in his death production, eliminating the fact that his pneumonia came, as stated by Dr. Hutchings, from the inspiration of material vomited?

"A. No; I don't think I can state that. I don't think I can state which was the greatest factor in his death, eliminating the fact that his pneumonia came from inspiration of material vomited."

The perforation of the intestine was located at the *post mortem*. On separating the coils of the intestines a perforation the size of a Canadian five-cent piece was found in the ileum 2½ feet from the *caput coli*. None of the physicians testified that Jendrus would surely have recovered from the operation if it had been performed Friday night; but there was testimony that an early operation presented the only chance for saving his life.

After the death of Jendrus the claimant here made claim for compensation. A committee of arbitration was appointed, testimony taken, and the award was in favor of the claimant for the sum of $10 per week for a period of 300 weeks from the 14th day of February, 1913.

Thereafter a review of this award was had, and the Industrial Accident Board affirmed it, filing an opinion and findings of facts, as follows:

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"In this case the deceased, Joseph Jendrus, was injured by a severe blow on the abdomen. The doctors attending the injured man diagnosed the injury as a probable rupture of the intestine, and advised an operation. The accident occurred about 1 o'clock in the afternoon on February 14th. At about 8 or 8:30 in the evening the doctors sought to operate on the injured man. It appears that he could not talk English, and communication was had with him through an interpreter. The injured man shook his head, indicating a refusal to be operated on. The matter of an operation was again brought up by the doctors on the following morning, February 15th. Jendrus, at that time, refused to submit to the operation, but consented at about 11:30 a. m. The operation was performed about 1:30 p. m. on February 15th. It seems that during the operation the patient vomited, and the vomit was drawn into the lungs, causing pneumonia, and resulting in his death a few days later. The operation disclosed a rupture of the intestines which was not sutured, and the *post mortem* examination showed the same to be in process of healing at the time of death. All communication with the deceased after the injury was through an interpreter. The board is of the opinion that the refusal to be operated on when first requested and the further action of deceased in delaying consent to the operation until nearly noon on the day following the accident was not so unreasonable and persistent as to defeat the claim for compensation in this case. He did submit to the operation after being convinced that it was absolutely necessary. It seems that nearly two hours elapsed from the time he gave this consent until the operation was performed. It is by no means certain that an earlier operation would have saved his life, nor is it certain that the operation actually performed would not have resulted in his recovery were it not for the fact that he vomited while under the anaesthetic, and inhaled some of the vomit, causing pneumonia. It seems clear that the operation was not too late to remedy the abdominal injury caused by the accident. The vomiting and resulting pneumonia came as an incident to the operation. The fact that the deceased was unable to speak English and was unaccustomed to the ways of this country should be given some weight. The judgment and decision of the arbitration committee is affirmed."

There was a motion to amend the findings, which was refused except in one instance, to which action there was no exception or error assigned, and the matter of refusal to amend is not before us.

The case is here upon certiorari to review the action of the Industrial Accident Board.

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The following grounds of error are assigned by appellants in the affidavit for the writ of certiorari:

(a) "The industrial accident board erred in affirming the said judgment and decision of the said arbitration committee."

(b) "The industrial accident board erred in deciding that the refusal of said Joseph Jendrus to be operated on when first requested and further action of the deceased in delaying consent to the operation was not so unreasonable and persistent as to defeat the claim for compensation."

(c) "The said industrial accident board erred in holding that the refusal of the said Joseph Jendrus to be operated on was not so unreasonable as to defeat the claim for compensation."

(d) "Said industrial accident board erred in deciding that the refusal of the said Joseph Jendrus was not so persistent as to defeat the claim for compensation in that the refusal to submit to an operation if unreasonable need not be persistent to defeat the claim for compensation."

(e) "Said industrial accident board likewise erred in their conclusion of law that the said refusal was not so persistent as to defeat the claim for compensation in that, as a matter of law, the said refusal need not be persistent to defeat said claim."

(f) "Said industrial accident board erred in its conclusion of law that the said refusal was not unreasonable."

(g) "That said industrial accident board erred in their decision, because it appears from the testimony that the said Joseph Jendrus did not come to his death as a result of the said injury for which compensation was claimed, but he came to his death by reason of his refusal to permit the medical attention offered him by said respondents, Michigan Workmen's Compensation Mutual Insurance Company and the Detroit Steel Products Company."

(h) "The said industrial accident board erred in holding, as a matter of law, that the death of the said deceased was not a result of his intentional and wilful misconduct."

(i) "The industrial accident board erred in holding, as a matter of law, that the claimant was entitled to compensation as widow of the said Joseph Jendrus; he having refused to consent to the medical attendance offered by the said employer, the Detroit Steel Products Company and the Michigan Workmen's Compensation Mutual Insurance Company, petitioners herein."

Section 12 of part 3 of the act (Act No. 10, Pub. Acts 1912) provides that the finding of fact made by the said Industrial Accident Board, acting within its powers, shall, in the absence of fraud, be conclusive, but the Supreme Court shall have

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power to review questions of law involved in any final determination of said Industrial Accident Board. No question is raised in this case involving the validity or constitutionality of the act in question. No claim of fraud is here presented.

The appellants state in their brief that the questions involved are:

(1) Did the injury arise out of and in the course of the employment?

(2) Was the employee guilty of intentional misconduct?

It is said that these questions are closely related, since it is clear that, if the employee had been guilty of intentional and wilful misconduct, he could not be acting within the course of his employment. We quote from appellants' brief as follows:

"Manifestly, the original injury—the striking of the spring against the abdomen of Jendrus—arose in the course of the employment, and arose out of the employment, and there is no showing that it was caused by the wilful misconduct of Jendrus. But the claim here is for compensation by reason of the death of Jendrus. The question then is, did the death occur from that injury, or was it caused by some other accident, act, or injury? * * * Here Jendrus had entered into an agreement by which he had undertaken to accept from his employer reasonable medical treatment and hospital services. The employer had undertaken that for a limited period of time it would furnish this service. That agreement was offered to the employee as a part consideration for his yielding up his right of action at common law. But it rests as well upon another theory, which is that the employer, by reason of the fact that it undertook to pay the injured employee a percentage of his earnings during the period of his disability, should have the right, as it was its duty, to furnish the medical attendance to that employee in order to minimize the injury and the consequent compensation."

"When, therefore, Jendrus refused the medical attendance offered by his employer, he refused that which the employer had undertaken to give him, and he refused a service that it was important for the employer to render by reason of the relation which it bore to the compensation that the employer must pay for disability or death. * * * The workmen's compensation statute specifically provides that the injury must arise out of the employment, and specifically negatives a recovery where there is intentional and wilful misconduct. It is true

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that the statute disregards negligence; but there still must remain, before there can be a recovery, a showing that the injury did result from an accident arising out of the employment, and not from any other cause."

"It would be a harsh rule that bound an employee who had been injured to accept in all cases the dictum of a surgeon who advises an operation. Manifestly the employee cannot be called upon at all times and under all circumstances to place himself absolutely in the hands of the employer's surgeon; but, where there is no dispute amongst his medical advisers, and the course suggested presents the only opportunity for the saving of the life, we insist that that refusal is a new and controlling cause for the injury for which recovery is sought."

Counsel for appellants call attention to the English act which provides, as ours does, for the payment for injuries arising out of and in the course of the employment, but that that act does not provide for medical care by the employer; and it is urged that in Michigan, if the employee refuses the reasonable medical services tendered by the employer, he is refusing compensation, and should not be permitted to compel the employer to pay the money compensation, while, at the same time, he is refusing to accept the medical compensation. It is urged that under the English decisions the rule has been universally laid down that, if the employee unreasonably refuses to accept the medical attention offered by the employer, he forfeits his compensation. And our attention has been called to the following English cases: *Donnelly* v. *Baird & Co., Ltd.* (Court of Sessions, Scotland, 1908), reported in 45 Scottish Law Reporter, 394; 1 Butterworths' Workmen's Compensation Cases, 95.

In that case a workman in the course of his employment had suffered injury to his left hand, in respect of which he was receiving compensation. On application by the employers to stop the payment of compensation on the ground that the continued incapacity for work resulted from the workman refusing to undergo surgical treatment, the sheriff's substitute found that the operations suggested by the doctors were simple or minor operations, not attended with appreciable risk or serious pain, likely, if submitted to, to restore the workman's

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capacity for work, and that the workman was of good constitution and sound general health; he thereupon ended the payment of compensation. The court of sessions, two justices dissenting, held that upon the findings of the sheriff's substitute his decision was right.

In the course of his opinion, Lord Justice-Clerk said:

"The question whether a refusal to submit to skilled treatment for the restoration, whole or partial, of capacity for work is an unreasonable refusal, is necessarily a question of degree. For it cannot be maintained that no matter what be the severity of the operation recommended, or how great soever the risk to life or general health of the treatment, the workman loses right to compensation unless he brings himself to undergo the treatment and to take the risk. I think the sound view on this matter is well expressed by Lord Adam in the case of *Dowds* v. *Bennie & Son* (40 S. L. R. 239), when he laid it down that a workman who has been incapacitated is not bound in every case to submit to any medical or surgical treatment that is proposed, under the penalty, if he refuses, or forfeiture of his right to a weekly payment—*e. g.*, in the case where a serious surgical operation is proposed with more or less probability of a successful cure.

"On the other hand, I hold it to be the duty of the injured workman to submit to such treatment, medical or surgical, as involves no serious risk or suffering, such an operation as a man of ordinarily manly character would undergo for his own good, in a case where no question of compensation due by another existed. In preparing this opinion I find that I have used almost the terms which are to be found in the case of *Anderson* v. *Baird & Co., Ltd.* (40 S. L. R. 263). These two cases which I have referred to seem to me to practically rule this case."

Lord McLaren said:

"There is of course no question of compelling the party to submit to an operation. The question is whether a party who declines to undergo what would be described by experts as a reasonable and safe operation is to be considered as a sufferer from the effect of an injury received in the course of his employment, or whether his suffering and consequent inability to work at his trade ought not to be attributed to his voluntary action in declining to avail himself of reasonable surgical treatment.

"In order to test the principle of decision I will suppose a more simple case. A workman whose trade requires the perfect use of both hands—a watchmaker or an instrument-maker for example—has the

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misfortune to break one of the bones of a finger, and from want of immediate assistance, or it may be from neglect, the bone does not unite in the proper way. The hand is disabled, but he is advised that by breaking the bone at the old fracture and resetting it the use of his hand will be completely restored. I am supposing a case where the operation is not attended with risk to health or unusual suffering, and where the recovery of the use of the hand is reasonably clear. If in such a case the sufferer, either from defect of moral courage, or because he is content with a disabled hand and is willing to live on the pittance which he is receiving under the compensation act, refuses to be operated on, I should have no difficulty in holding that his continued inability to work at his trade was the result of the refusal of remedial treatment, and that he was not entitled to further compensation.

"Passing to the other extreme, it is easy to figure a case of internal injury where an operation if successful would restore the sufferer to health, but where the surgeon was bound to admit that the operation was attended with danger. In such a case it would be generally admitted that there was not only a legal but a moral right of election on the part of the injured person; and if he preferred to remain in his disabled condition rather than incur the risk of more serious disablement or death, it could not be said that his inaction disentitled him to further compensation.

"In view of the great diversity of cases raising this question, I can see no general principle except this, that if the operation is not attended with danger to life or health, or extraordinary suffering, and if according to the best medical or surgical opinion the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him. In other words, the statutory obligation of the employer to give maintenance during the period of incapacity resulting from an accident, is subject to the implied condition that the workman shall avail himself of such reasonable remedial measures as are within his power."

Our attention is also directed to the case of *Warncken* v. *Moreland & Son, Ltd.* (Court of Appeal, England, 1908), 100 Law Times, 12, 2 B. W. C. C. 350. There it was held that, where a workman was injured by an accident in respect of which he was otherwise entitled to receive compensation, and refused to submit to a surgical operation of a single character involving no serious risk of life or health, and which, according to the unanimous professional evidence, offered a rea-

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sonable prospect of the removal of the incapacity from which he suffered, that under those circumstances he had debarred himself from any right to claim further compensation under the act for his continued disability, as such continuance was not attributable to the original accident, but to his unreasonable refusal to avail himself of surgical treatment. In that case the claimant had injured his foot and had had two toes removed. He still suffered pain, and the X-rays showed that a piece of bone was loose in the big toe. The doctors advised an operation; but the man refused. Moulton, L. J., said:

"To hold the contrary would lead to this result, that a workman who had an injury, however small, might refuse to allow it to be dressed and let a trivial burn, say, become a sloughing sore, and lead to partial or total incapacity. * * * The distinction is between being reasonable and not being reasonable."

This case was followed by the case of *Tutton* v. *Owners of Steamship Majestic* (Court of Appeal, 1909), 100 L. T. 644, 2 B. W. C. C. 346. It was there held that a workman injured by an accident arising out of and in the course of his employment within the meaning of the act, who refuses, on the advice of his own doctor, to submit to the surgical operation which, in the opinion of such medical man, involved some risk to his life, is not acting unreasonably in such refusal, and is not thereby precluded from claiming compensation from his employer under the act in respect to his continued disability to work. There the court said:

"The test is not really whether on the balance of medical opinion the operation is one which might reasonably be performed. The test is whether the workman in refusing to undergo the surgical operation acted unreasonably. I altogether decline to say that, in a case of an operation of this kind, a workman can be said to act unreasonably in following the advice of an unimpeached and competent doctor, even though on the balance of medical evidence given at a subsequent date the learned county court judge might hold that the operation was in its nature one which might reasonably and properly be performed."

Here the applicant was a sailor on board the steamship Ma-

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jestic, and met with an accident which resulted in double rupture. He went to the hospital at Southampton, where the doctor advised an operation. The applicant then consulted another surgeon, who advised him not to undergo an operation, as he was suffering from Bright's disease of the kidneys, which would, in his opinion, render it dangerous for him to have an anaesthetic administered; the physician saying that it would be barbarous for him to undergo an operation without an anaesthetic. With kidney disease an anaesthetic would be a risk to his life.

The appellee has called our attention to the case of *Marshall* v. *Navigation Co.* (1910), 1 K. B. Div. 79, to the effect that, where the injured party refuses to undergo a surgical operation, the employer has the burden of showing that the operation would have accomplished its purpose.

Attention is also called by appellee to the case of *Proprietors of Hays' Wharf, Ltd.*, v. *Brown,* 3 B. W. C. C. 84, to the effect that the burden is upon the employer to show that the refusal of the workman was unreasonable.

In none of the cases cited by appellants' counsel was the operation anything more than a minor operation for a trifling injury. We think the cases clearly distinguishable from the instant case, which involved a major operation of a serious nature. None of the testimony in the case goes to the length of showing that Jendrus' life would have been saved had the operation been submitted to at 8 o'clock on the evening of February 14th, which was the first time that Dr. Hutchings had reached the conclusion that an operation was necessary. Peritonitis had already set in, and the vomiting had commenced, and vomitus of a fecal nature was then being expelled. That it was the injury which caused the peritonitis is not questioned; that it was the peritonitis which caused the vomiting of fecal matter is not questioned; that it was the taking of fecal matter into the lungs which caused the pneumonia is claimed by all of the surgeons who testified. There is testimony that he might have recovered without any operation, although that result could not have been reasonably expected.

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Under all the circumstances of the case, including the fact that Jendrus was a foreigner, unable to speak or understand the English language, that he was suffering great pain on the evening of the 14th, that he was unacquainted with his surroundings, and that he did consent to, and did submit to, an operation within 15 or 16 hours after it was first found necessary, in the judgment of the surgeons, we cannot hold, as matter of law, that the conduct of Jendrus was so unreasonable and persistent as to defeat the claim for compensation by his widow. Neither can we hold that Jendrus by his conduct in the premises in causing a delay in the operation was guilty of intentional and wilful misconduct. We cannot say, as matter of law, that the industrial accident board erred in its conclusions of law in affirming the action of the committee on arbitration. No other questions of law are presented by the record.

The judgment and decision of the said Board is therefore affirmed, with costs against appellants.

SARAH E. ADAMS,
Applicant,
vs.
ACME WHITE LEAD & COLOR WORKS,
Respondent.

LEAD POISONING—OCCUPATIONAL DISEASE.

Applicant's decedent was employed by respondent in its red lead plant. He contracted lead poisoning from the effects of which he died. Compensation was refused, under the contention that his death was not the result of an accident, but a disease, and therefore the case was not covered by the act. It was further contended that if the act was held to apply to industrial diseases it would, in that respect, be unconstitutional.

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HELD: 1. That the lead poisoning suffered by decedent in this case constituted a personal injury of a serious and deadly character, although classified under the English decision as an occupational disease and not an accident.

2. That part of Sec. 1, Part II, which covers injuries, received otherwise than by accident, is not such a variance from the title of the act as to render a portion of this section unconstitutional.

Appeal of Acme White Lead & Color Works from the decision of an arbitration committee awarding Sarah E. Adams compensation at the rate of $7.50 per week for 300 weeks for the death of her husband. Affirmed.

Opinion by the Board:

Augustus Adams, the husband of the applicant, was an employe of the respondent, working in its Red Lead plant, so-called, in Detroit. On May 29, 1913, he became so affected from lead poisoning that he was obliged to quit his work and on June 27 he died from the effects of such lead poisoning. These facts are undisputed and the sole question in the case is whether the Workmen's Compensation Act covers a case of death by lead poisoning arising out of and in the course of the employment. It is contended on behalf of respondent as follows:

1. That lead poisoning is not an accident.

2. That Act No. 10, Public Acts of 1912, was not intended to provide compensation for diseases, but only accidents.

3. If the Act does apply to industrial diseases, it is so far unconstitutional.

It seems to be established under the English cases that Lead Poisoning is not an accident, but is an occupational disease. It seems to follow from this that unless the Michigan Workmen's Compensation Law is broad enough to include and cover occupational diseases the applicant's claim in this case must

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be denied. The controlling provision of the act on this point is found in Section 1 of Part II, and is as follows: "If an employe * * * receives a personal injury arising out of and in the course of his employment," he shall be entitled to compensation, etc. It will be noted that the above language does not limit the right of compensation to such persons as receive personal injuries "by accident." The language in this respect is broader than the English act and clearly includes all personal injuries arising out of and in the course of the employment, whether the same are caused "by accident" or otherwise. It is equally plain that Lead Poisoning in this case in fact constitutes a personal injury, and that such personal injury was of a serious and deadly character. The Board is therefore of the opinion that the section of the Michigan Act above quoted is broad enough to cover cases of Lead Poisoning such as the one in question.

It is claimed, however, on behalf of the respondent that the title of the act is such as to exclude all personal injuries excepting those received "by accident" and that in so far as the body of the act is broader than the title, it is unconstitutional. This point has been ably briefed and argued on the part of the respondent and we are asked to hold in this case that the portion of the provisions of Section 1 of Part II which covers injuries received otherwise than by accident is invalid because it is broader than the title. After a careful consideration of the question, the Board has reached the conclusion that it would not be justified in holding such portion of the Compensation Act to be invalid on the constitutional grounds urged by the respondent. The award of the committee on arbitration is therefore affirmed.

This case was appealed to the Supreme Court and reversed, the Court holding that the Michigan Workmen's Compensation Law is limited to personal injuries *by accident,* and does not apply in cases where the injury is classed as an occupational disease. The full opinion of the Supreme Court is here given:

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SUPREME COURT.

SARAH E. ADAMS,
Applicant,
vs.
ACME WHITE LEAD AND COLOR WORKS,
Respondent.

1. ACCIDENT—DEFINITION—MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—POISONING.
An accident is an unforeseen event, occurring without the design or will of the person whose act causes it; it partakes of the nature of an unexpected or unusual occurrence, brought about by some unknown cause, and involving something fortuitous or unexpected; or, if the cause is known, having an unprecedented consequence.

2. MASTER AND SERVANT—ACCIDENT—PERSONAL INJURIES.
Under the provisions of the workmen's compensation act, no recovery may be allowed for occupational diseases such as lead poisoning, which, being gradually acquired, is outside the scope of the requirement that notice is to be given within ten days after an accident, and of the title and terms of the statute as to compensating accidental injuries. Act No. 10, Pub. Acts Extra Session 1912 (2 How. Stat. (2d. Ed. §3939 *et seq.*).

3. SAME—CONSTITUTIONAL LAW—TITLE OF STATUTE.
If the act was intended to include such occupational diseases, the title was not broad enough to express that object within Art. 5, Sec. 21, of the Constitution.

Certiorari to the Industrial Accident Board to review an award of compensation to Sarah E. Adams against the Acme White Lead & Color Works for the death of claimant's husband. Defendant brings certiorari. Submitted April 15, 1914. Reversed July 25, 1914.

Bowen, Douglas, Eaman & Barbour, for appellant.
Noble T. Lawson, for appellee.

STONE, J. The questions involved in this case are raised

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on certiorari to the Industrial Accident Board. On December 18, 1912, Augustus Adams, a resident of Sandwich, Ontario, began work at the plant of the Acme White Lead & Color Works in the city of Detroit. His duties were those of a sifter or bolter tender in the red lead plant. His work brought him in contact with the lead. On May 29, 1913, he left his work at the quitting time, but that evening became so ill that he was unable to return to work again. He died on June 27, 1913. There is no doubt that the cause of his death was lead poisoning, contracted industrially; *i. e.*, "was an occupational disease," as the return of the Industrial Accident Board shows. The return states:

"That during said period between December 18, 1912, and June 27, 1913, one Augustus Adams was in the employ of the Acme White Lead & Color Works; * * * and that during said period, while in the course of said employment, he contracted an occupational disease, to wit, red lead poisoning, upon the premises of the said company, and that on June 27, 1913, he died as a result of said disease."

The claim of the widow, under Act No. 10 of the Public Acts of the Special Session of 1912, was duly presented to a committee of arbitration and allowed. Thereafter, in accordance with the provisions of said act, the respondent filed with the said board a claim for review of the decision of said committee on arbitration, and later, after a full hearing, the said Board made and entered an opinion and order, denying the centention of the respondent, and affirming the award of said arbitration committee. The opinion of the said board, upon which its order was based, so fully presents the questions involved that we cannot do better than to quote therefrom. After referring to the facts above set forth, it is said:

"These facts are undisputed, and the sole question in the case is whether the workmen's compensation act covers the case of death by lead poisoning arising out of and in the course of the employment. It is contended on behalf of respondent as follows: (1) That lead poisoning is not an accident; (2) that Act No. 10, Public Acts of 1912, was not intended to provide compensation for diseases, but only accidents; (3) if the act does apply to industrial diseases, it is so far unconstitutional.

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"It seems to be established under the English cases that lead poisoning is not an accident. It is an occupational disease. It seems to follow from this that, unless the Michigan workmen's compensation law, is broad enough to include and cover occupational diseases, the applicant's claim in this case must be denied. The controlling provision of the act on this point is found in section 1 of part 2, and is as follows: 'If an employee * * * receives a personal injury arising out of and in the course of his employment,' he shall be paid compensation, etc. It will be noted that the above language does not limit the right of compensation to such persons as receive personal injuries by accident. The language in this respect is broader than the English act, and clearly includes all personal injuries arising out of and in the course of the employment, whether the same are caused 'by accident' or otherwise. It is equally plain that lead poisoning in this case, in fact, constitutes a personal injury, and that such personal injury was of serious and deadly character. The board is therefore of the opinion that the section of the Michigan act is broad enough to cover cases of lead poisoning, especially the one in question."

The Board also reached the conclusion that it would not be justified in holding the part of the act referred to invalid, on constitutional grounds.

By the assignments of error, it is claimed that the Board erred: *First,* in construing the said act so as to provide for the awarding of compensation for an occupational disease, specifically red lead poisoning; *second,* in overruling appellant's contention that, if in said act the legislature intended to provide compensation for an occupational disease, particularly red lead poisoning, said act, in so far as it does so provide, is unconstitutional.

1. Does the Michigan act include and cover occupational diseases? This is a fair question, and should be fairly answered. What is an "occupation," or "occupational disease?" The Century Dictionary and Cyclopedia defines an "occupation disease" as "a disease arising from causes incident to the patient's occupation, as lead poisoning among painters." In the instant case the undisputed medical evidence shows that lead poisoning does not arise suddenly, but comes only after long exposure. "It is a matter of weeks or months or years." It is brought about by inhalation, or by the lead com-

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ing into the system with food through the alimentary canal, or by absorption through the skin. In any case it is not the result of one contact or a single event.

"In occupational diseases it is drop by drop, it is little by little, day after day for weeks and months, and finally enough is accumulated to produce symptoms."

It also appears that lead poisoning is always prevalent in the industries in which lead is used, and a certain percentage of the workmen exposed to it become afflicted with the disease. Elaborate precautions are taken against it in the way of instructions to the men, masks to protect the respiratory organs, etc. Whether the workman will contract it or not will depend upon the physical condition, care, and peculiarity of the individual; and the amount of time it will take to produce ill effects or death also varies.

An "accident" is defined in Black's Law Dictionary as follows:

"Accident. An unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence; the effect of an unknown cause, or, the cause being known, an unprecedented consequence of it; a casualty."

It might be well to keep in mind the conditions sought to be remedied by the diverse workmen's compensation enactments which have been adopted by several of the States of the Union and in foreign countries. The paramount object has been for the enactment of what has been claimed to be more just and humane laws to take the place of the common-law remedy for the compensation of workmen for accidental injuries received in the course of their employment, by the taking away and removal of certain defenses in that class of cases.

In this our own act is not an exception. It first provides that in any action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injuries so sustained, it shall not be a defense: (*a*) That the employee was negligent unless and except it shall appear that such negligence was wilful;

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(*b*) that the injury was caused by the negligence of a fellow employee; (*c*) that the employee had assumed the risks inherent in or incidental to or arising out of his employment, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances.

It is then enacted that the above provisions shall not apply to actions to recover damages for the death of, or for personal injuries sustained by, employees of any employer who has elected, with the approval of the industrial accident board thereinafter created, to pay compensation in the manner and to the extent thereinafter provided. Manifestly, the terms "personal injury" and "personal injuries," above mentioned, refer to common-law conditions and liabilities, and do not refer to and include occupational diseases, because an employee had no right of action for injury, or death due to occupational diseases at common law, but, generally speaking, only accidents, or, rather, accidental injuries, gave a right of action. We are not able to find a single case where an employee has recovered compensation for an occupational disease at common law. Certainly it can be said that in this State no employer has ever been held liable to the employee for injury from an occupational disease, but only for injuries caused by negligence. It seems to us that the whole scheme of this act negatives any liability of the employer for injury resulting from an occupational disease. The title of the act is significant:

"An act to promote the welfare of the people of this State, relating to the liability of employers for injuries or death sustained by their employees, providing compensation for the accidental injury to, or death of employees, and methods for the payment of the same, establishing an industrial accident board, defining its powers, providing for a review of its awards, making an appropriation to carry out the provisions of this act, and restricting the right to compensation or damages in such cases to such as are provided by this act."

The first provision defining the employers who are subject to the act is found in section 5, subd. 2, of part 1. It reads:

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"Every person, firm and private corporation, including any service corporation, who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of *the accident* to the employee for which compensation under this act may be claimed, shall in the manner provided in the next section have elected to become subject to the provisions of this act, and who shall not, prior to *such accident*, have effected a withdrawal of such election, in the manner provided in the next section."

While not controlling, it is pertinent to note the history of the Michigan act.

By Act No. 245, Public Acts of 1911, the Legislature created a commission—

"To make the necessary investigation, and to prepare and submit a report * * * setting forth a comprehensive plan and recommending legislative action providing compensation *for accidental injuries or death* of workmen arising out of and in the course of employment."

Section 2 of the act reads:

"It shall be the duty of the commission of inquiry to fully investigate the conditions affecting, and the problems involved in the matter of compensation *for accidental injuries or death* of workmen arising out of and in the course of employments."

The act drawn pursuant to this authority was passed by the Legislature without change. While it cannot be claimed that the power of the Legislature was limited to enacting the bill prepared by the commission, yet, when that body passed the bill without change, it may be said that it adopted the meaning that must have been intended by the commission.

It is the claim of appellant that lead poisoning contracted industrially is not an accident: that such poisoning, being something that is contracted by a fairly certain percentage of those working in industries where lead is used, cannot be considered as unexpected; that it comes as a gradual, slow process, and hence is not an "accident." The appellee, not agreeing with the reasoning of the board, contends that the act does cover injuries occasioned by lead poisoning, and that such poisoning contracted in the course of employment is an "accidental injury."

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The English act of 1897 was entitled:

"An act to amend the law with respect to compensation to workmen for accidental injuries suffered in the course of their employment."

The body of the act provided that:

"If in any employment, to which this act applies, personal injury by accident arising out of and in the course of employment, is caused to a workman his employer shall be liable."

It was not long before it was necessary to determine what was personal injury by accident, and to give a definition of "accident." In *Hensey* v. *White* (1900), 1 Q. B. 481, the language of an earlier case was approved where it was said:

"I think the idea of something fortuitous and unexpected is involved in both words 'peril' or 'accident.'"

In *Fenton* v. *Thorley & Co.*, 72 L. J. K. B. 790, it was said:

"The expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked for mishap or an untoward event which is not expected or designed."

Finally, in *Steel* v. *Cammell, Laird & Co., Ltd.* (1905), 2 K. B. 232, the precise point was decided. The applicant, a caulker in the employment of ship-builders, was seized with paralysis, caused by lead poisoning, and became totally incapacitated for work. In the course of his work, in which he had been employed by the shipbuilders for a period of two years before he became incapacitated, he had to smear either with red or white lead certain places between the plates of ships into which water-tight shoes were put. The poisoning was such as might be expected from the nature of the work. It might be caused either by inhalation, or by eating food without having removed the lead from the hands, or by absorption through the skin. Only a small proportion of cases of poisoning of this description occurred amongst a number of persons working with red or white lead. The poisoning could not be traced to any particular day, and its development was a gradual process, and generally took considerable time. Held,

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that the lead poisoning could not be described as an "accident," in the popular and ordinary use of that word, so as to entitle the applicant to compensation for personal injury by accident arising out of, and in the course of, his employment, within the meaning of section 1 of the workmen's compensation act of 1897. *Fenton* v. *Thorley & Co.*, 72 L. J. K. B. 787, and *Brintons, Lim.* v. *Turvey,* 74 L. J. K. B. 474, considered.

The court in the above case [*Steel* v. *Cammell, Laird & Co., Ltd.*] reasoned that, under the act, a date must be fixed as that on which the injury by accident occurred, and it was said:

"It has been suggested that there was a series of accidents by the continuous absorption of lead, by one or other of the three processes named; but this suggestion does not meet the difficulty which arises from the provisions of the act as to notice of the particular date of the accident or injury."

Others of the judges said that the injury was not unexpected; that it was certain that somebody would suffer, and this man turned out to be susceptible to the poison. As a result of this case, it was found necessary to change the act, if cases like this were to be included; so in 1906, less than a year later, the act of 6 Edw. VII., chap. 58, was passed, entitled:

"An act to consolidate and amend the law with respect to compensation to workmen for injuries suffered in the course of their employment."

The body of the act again provides compensation for "personal injury by accident," but it also (section 8) provides that:

"Where the disease is due to the nature of any employment * * * he or his dependents shall be entitled to compensation under this act as if the disease * * * were a personal injury by accident arising out of and in the course of that employment"—if it be one of the diseases contained in schedule 3 of the act.

In that schedule "lead poisoning" and its sequelæ are there-

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in scheduled. Of this act the Encyclopedia of Laws of England, vol. 5, p. 227, states:

"The extension by this act of the principle of workmen's compensation to industrial disease is a new departure. Disease, though contracted industrially, is not an 'accident' in the ordinary acceptation of the term."

It was also said of the act that a new phase in workmen's compensation—compensation for disease arising out of employment—was a new feature in this type of legislation. The language of the act should be particularly noted. It does not attempt to declare an industrial disease an "accident," but gives compensation therefor "as if the disease * * * were a personal injury by accident."

Considering the condition to be remedied and the history of the Michigan act, and comparing it with the English act of 1897, we are not able to agree with the accident board when it says, referring to the language which it quotes, that our act is broader than the English act, and clearly includes all personal injuries arising out of and in the course of an employment, whether the same are caused by "accident" or otherwise. In the language quoted by the board it is true that the words "personal injury" are used, but in determining the nature of the personal injury intended to be covered by the act, the whole act, with its title, should be examined and considered; and, so examined, we think it should be held that the words "personal injury," as quoted by the board, refer to the kind of injury included in the title and other portions of the act, which plainly refer to "accident injury to, and death of, employees." The whole scope and purpose of the statute, in our judgment, was to provide compensation for "accidental injuries," as distinguished from "occupational diseases." We must hold, therefore, that the provisions of the act of this State are very similar to the early English act above referred to.

We have shown how the English act was subsequently amended by adding the provision permitting the recovery of

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compensation for certain scheduled diseases, caused by, or especially incident to, particular employments—diseases known as occupation or industrial diseases. Not before, but since, the passage of this amendment to the English act, the English courts have sustained the rights of recovery in such cases as are here presented. The framers of our act either did not know of the amendment to the English act, or else they did not intend to permit the recovery of compensation in such cases. If it is said that it is just as important to protect employees against such conditions as are here presented as it is to protect them against injuries arising from what are strictly termed "accidents," our answer is that that is a matter which should be addressed to the Legislature. In the absence of a provision in the statute meeting this situation, the court is unable to award a recovery.

Counsel for appellee have referred to some of the English cases where compensation was allowed for injuries caused by poisoning, but an examination of those cases will show that the injuries were purely accidental. *Higgins* v. *Campbell & Harrison, Ltd.* (1904), 1 K. B. 328, affirmed (1905) A. C. 230, is a fair illustration of those cases. There a workman employed in a woolcombing factory in which there was wool which had been taken from sheep infected with anthrax contracted that disease by contact with the anthrax bacillus which was present in the wool. In that case compensation was allowed, and it was held that the workman was injured by accident arising out of and in the course of his employment within the meaning of the English act of 1897. The court treated the disease as caused by an accident, by one particular germ striking the eyeball. It was considered that the accidental alighting of the bacillus from the infected wool on the eyeball caused the injury. It was treated as if a spark from an anvil hit the eye. This may be seen from the statement of Lord Macnaghten:

"It was an accident that the thing struck the man on a delicate and tender spot in the corner of his eye."

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We think that this and kindred cases can be readily distinguished from the lead poisoning cases.

The same difficulty about giving notice of the accident or injury noted in the English act applies to the Michigan act. Every employer is required to keep a record of all injuries, fatal or otherwise, received by employees in the course of their employment. Section 17 of part 3 of our statute provides that:

"Within ten days after the occurrence of an accident resulting in personal injury a report thereof shall be made in writing to the industrial accident board on blanks to be procured from the board for that purpose."

And a penalty is prescribed for neglect to make such report.

In the instant case Adams left his place of employment at the usual quitting time on May 29, 1913. He did not return. What knowledge his employer had of his sickness does not appear. It is not apparent what notice could be given under our statute in such a case. If our statute, in its present form, should be held to apply to occupational or industrial diseases, then compensation might be claimed of an employer where the term of employment had been for a brief period, whereas the disease may have been contracted while in the employment of a former employer. All this is provided for in the amendment of 1906 in the English act, where provision is made for investigation and apportionment among employers for whom the employee worked during the previous year "in the employment to the nature of which the disease was due." There is no such machinery or procedure provided for in our statute.

We are not unmindful of the holdings of the supreme court of Massachusetts in *Re Hurle,* 217 Mass. 223 (104 N. E. 336), and *Johnson* v. *Accident Co.,* 104 N. E. 735. In the latter case that court held that the personal injury of a lead grinder, sickness incapacitating him from work resulting from the accumulated effect of gradual absorption of lead into his system, arose "out of and in the course of his employment" within the workmen's compensation act (Stat. 1911, chap. 751)

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of that State. That case is founded upon *In re Hurle, supra,* which was a case of blindness incurred from an acute attack of optic neuritis, induced by the poisonous coal tar gases escaping from a furnace about which he was required to work. The matter of accidental injury was not discussed by the court. The court said:

"The question to be decided is whether this was a 'personal injury arising out of and in the course of his employment' within the meaning of those words in the statute."

The court further, in referring to the comments of counsel for the employer that the act could not apply to such an injury as that sustained, said:

"It might be decisive if 'accident' had been the statutory word. It is true that in interpreting a statute words should be construed in their ordinary sense. 'Injury,' however, is usually employed as an inclusive word. The fact remains that the word 'injury,' and not 'accident,' was employed by the legislature throughout this act."

As "accident" is the controlling word in our act, we do not think that the Massachusetts decision should be held to apply here, as the construction of that act has little, if any, bearing on the Michigan act.

Our attention has been called to the Massachusetts act, which differs in many respects from our act. That act is entitled:

"An act relative to payments to employees for personal injuries received in the course of their employment, and to the prevention of such injuries."

The whole scope of the act seems to be to provide for compensation for personal injuries received in the course of employment. In many instances where the word "accident" occurs in our statute the word "injury" is used in the Massachusetts statute. It is true that the Massachusetts board is termed an "Industrial Accident Board," but, aside from the use of the word "accident" in that title, we are unable to find the word in the body of the act, except in two instances in

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section 18 of part 3, which provides for the keeping of a record and making a report by the employer in case of accident. This may be said not to be very controlling; but, in our judgment, it has to do with the inquiry as to the scope of the act. We are unable to follow those cases as authority under our statute.

In New Jersey, in the case of *Hichens* v. *Metal Co.*, N. J. Law Journal (Com. Pl. June 25, 1912), p. 327 which arose under the New Jersey act (P. L. 1911, p. 134) entitled very similarly to the Massachusetts act, to wit—

> "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder"

—it was held that compensation could not be awarded for a disease known as copper poisoning, caused by contact with the copper filings and inhaling the dust from same by an employee in his work, which involved the grinding and polishing of brass products. This decision cannot be considered as authoritative, as it is that of the court of common pleas, and not the court of last resort.

The Federal compensation act (Act May 30, 1908, chap. 236, 35 Stat. 556 [U. S. Comp. Stat. Supp. 1911, p. 468]), relating to government employees does not contain the word "accident" in the principal clause, but provides that compensation shall be granted "if the employee is injured in the course of such employment." Subsidiary clauses provide for the reporting of "accidents," and otherwise refer to "accidental injuries."

In the latest opinion of the attorney general, being in the case of John Sheeran, where the employee was a laborer engaged in river and harbor construction, and, while engaged in work in the course of his employment, contracted a severe cold, which resulted in pneumonia, that officer said:

> "There is nothing either in the language of the act or its legislative

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history which justifies the view that the statute was intended to cover disease contracted in the course of employment, although directly attributable to the conditions thereof. On the contrary, it appears that the statute was intended to apply to injuries of an accidental nature resulting from employment in hazardous occupations—not to the effects of disease."

It has been reiterated under the Federal act that acute lead poisoning is not such an injury as entitles an employee to compensation. Similarly, where a workman suffered from cystitis and prostatitis, which he claimed was the result of overwork, it was held that he was merely suffering from disease which was not covered by the terms of the Federal act, and compensation was refused. 1 Bradbury on Workmen's Compensation (2d Ed.) pp. 342, 343.

We are of opinion that in the Michigan act it was not the intention of the legislature to provide compensation for industrial or occupational diseases, but for injuries arising from accidents alone.

2. If it were to be held that the act was intended to apply to such diseases, it would, in so far as it does so, be unconstitutional and in violation of section 21 of article 5 of the Constitution of this State, which provides, that:

"No law shall embrace more than one object, which shall be expressed in its title."

That the act, if it were held to apply to and cover occupational diseases is unconstitutional in so far as it does so is shown by the fact that the body of the act would then have greater breadth than is indicated in the title. A careful analysis of the title of the act shows that the controlling words are "providing compensation for accidental injury to or death of employees." No compensation is contemplated except for such injuries. The prefatory words are generally dependent upon the above-quoted clause. The only compensation provided is for "accidental injury to or death of employees," and the last clause of the title restricts the right to compensation or damages in such cases "to such as are provided by this act."

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The Massachusetts decisions have no bearing upon this branch of the case for two reasons: One is that the titles of the respective acts differ materially; and the other reason is that Massachusetts has no such constitutional provision as ours above quoted. We have dealt with this question of title too recently to make it necessary to refer to our numerous decisions upon the subject.

For the reasons above given, we are constrained to reverse the order and judgment of the Industrial Accident Board.

Reversed.

KATHARYN REDFIELD,
Applicant and Appellee,
vs.
DR. DENTON'S SLEEPING GARMENT MILLS,
and
MICHIGAN WORKMEN'S COMPENSATION MUTUAL INSURANCE COMPANY,
Respondents and Appellants.

INTENTIONAL AND WILFUL MISCONDUCT—DISEASE—CUMULATIVE EVIDENCE.

Applicant's decedent received injuries by his hand coming in contact with the gears in a carding machine in appellant's factory. Gangrene set in and he died on May 4, which was sixteen days after the injury. Appellants contend that the injury was the result of the wilful and intentional misconduct of decedent, by his disregarding the signs warning employees to keep their hands off the machines and not to clean machines while in motion; and further, that he was suffering from diabetes when injured and that his death was the result of that disease.

HELD: 1. That the act which decedent was performing at the time of his injury, was picking off some of the cotton which had

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collected on the carding cylinder, and that such action was necessary and ordinarily performed by and required of the operator of the machine.

2. That the claim that death was due to diabetes was not sustained by the proofs.

3. The application of the respondents made after the hearing on review for leave to take testimony of expert witnesses in Detroit and elsewhere, which testimony would be merely cumulative, denied.

Appeal of Michigan Workmen's Compensation Mutual Insurance Co. from the decision of an arbitration committee, awarding Katharyn Redfield $5.25 per week for 300 weeks, for the death of her husband. Affirmed.

Opinion by the Board:

On April 18, 1913, William H. Redfield, the husband of the applicant, was injured in the factory of the Dr. Denton Sleeping Garment Mills at Centerville, Michigan. He was employed in the card room in the factory, where for many years he had worked as a carder in operating the carding machines. There was no eye witness to the accident, but it appeared from the blood on the machinery and other circumstances that his hand was caught in a large card cylinder and the gear connected with it. The hand was badly lacerated, necessitating the amputation of three fingers. The other injuries to the hand above the fingers were dressed and treated an effort being made to save as much of the hand as possible. The injured man was taken to the hospital at Kalamazoo for treatment, and while there gangrene set in and he died on May 4th. It is the claim of the applicant that compensation should be denied for two reasons:

1. That the deceased was guilty of wilful and intentional misconduct.

2. That he was suffering from diabetes when injured, and

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that his death was the result of the disease rather than the injury.

The claim of intentional, wilful misconduct is based on what is claimed to be a violation of the factory rules by deceased. It was shown that on each of the carding machines was one or more signs "hands off," and also that there were signs through the factory and in the carding room to the effect that "cleaning machinery while in motion is strictly forbidden." It is claimed that deceased was in the act of picking off some of the cotton which had collected on the card cylinder near the gear when he received his injury, and that such act constituted a violation of the above rules. This claim, however, was refuted by the testimony of the general manager and also the secretary and treasurer of the Dr. Denton Company. It was shown by the testimony of these witnesses that the carding machines are so adjusted that the machinery operates through a system of weights and when it reaches a certain weight then it dumps down upon the apron, and if any person puts his hands on the machinery and disturbs the mechanism it would cause the machine to dump and seriously interfere with its operation. That the sign "hands off" was put up to warn people not to put their hands on the machine because of producing the above results, and not because the machinery was dangerous. These signs were put there by the manufacturers of the machines. It was further shown by the same witnesses that the sign relating to the cleaning of the machinery while in motion did not refer to picking off accumulations of cotton on the cards or gears but referred to the general cleaning of the machines. That it was necessary in the operation of the card machine to pick off accumulations of cotton while the machinery was in motion, and that the employes were expected and required to do it. That every time a carding machine is stopped it produces an unevenness in the work, involves the loss of time and impairs the quality of the product. If the accumulations were not picked off it would produce thickening in parts of the product

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and make it unfit for use. Picking off cotton in this way while the machines were in operation was in fact a part of the duties of the operator. This testimony is practically undisputed, and the first point must be held against the respondents.

The claim that the gangrene and the resulting death of the deceased was caused by his diabetes and not by the injury must also be decided against the respondents. The testimony produced in support of this claim, particularly the medical testimony, fell far short of proving the same, and apparently was disappointing to the respondents.

We think we should refer in this opinion to the request made by counsel for the respondent after the hearing on review before the full Board and before the decision of the case, for leave to take the depositions of several physicians in Detroit, who would give expert evidence tending to show that Mr. Redfield's death was caused by gangrene produced by diabetes. The Board refused to grant such request. The Workmen's Compensation Law provides that the arbitration, which is the first and fundamental hearing in the case, shall be held at the place where the accident occurred, in order to make such hearing reasonably convenient and inexpensive to the injured workman or his dependents. The witnesses in such case on behalf of the workman or his dependents are usually found at or near the place where the accident occurred, and the same is true of the witnesses for the employer in a vast majority of cases. If the board should permit a reopening of the case to take such proposed expert testimony in a distant city, necessitating the expense on the part of the widow to be present at the taking of such testimony and to protect her interest by cross-examination of witnesses, such action would defeat one of the most important provisions of the law and such practice would place it in the power of the employer to make the recovery of compensation in some cases so vexatious and expensive as to compel the abandonment of claims. This is not a case of newly discovered evidence, but is a request for permission to put in expert and opinion evidence

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which would be merely cumulative. The award in this case is affirmed.

This case was appealed to the Supreme Court, and the decision of the Board affirmed, the full opinion of the Supreme Court being as follows:

SUPREME COURT.

KATHARYN REDFIELD,
Claimant and Appellee,
vs.
MICHIGAN WORKMEN'S COMPENSATION MUTUAL INSURANCE COMPANY,
and
DR. DENTON'S SLEEPING GARMENT MILLS,
Respondents.

1. MASTER AND SERVANT—DANGEROUS MACHINERY—WARNING—CONTRIBUTORY NEGLIGENCE—WORKMEN'S COMPENSATION.
Where a former superior servant of a corporation testified that signs were placed on machines in the shop, marked "Hands Off," to warn employees from touching the machinery, for the reason that such act tended to disturb the adjustment, and the warning was not intended as a danger sign, there was sufficient testimony to support the finding of the Industrial Accident Board, that the warning was not against danger.

2. SAME.
HELD: also, that signs placed about the shop advising servants not to clean machinery in motion did not prohibit an employee from removing collections of cotton which frequently gathered on a guard of the carding machine and that required to be removed in order to prevent imperfections in the cloth.

3. APPEAL AND ERROR—INDUSTRIAL ACCIDENT BOARD.
Only where there is no proof to support a finding of fact can the court interfere with the finding of the accident board on certiorari.

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION—INSURANCE—PRACTICE.

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Where the date of hearing was fixed on September 9th, and the insurance company which indemnified the employer against accidents did not appear, but the attorneys for claimant appeared and were heard, no ground of objection could be based on the action of the Board in declining to hear further testimony, though granting the insurer a hearing on a subsequent date.

Certiorari to the Industrial Accident Board. Submitted January 20, 1914. Decided January 4, 1915.

Katharyn Redfield presented her claim for compensation for the death of her husband, William Redfield, while employed by the Dr. Denton Sleeping Garment Mills. Contestant, the Michigan Workmen's Compensation Mutual Insurance Company, bring certiorari from an order awarding compensation. Affirmed.

Beaumont, Smith & Harris, for appellant,
George H. Arnold, for claimant.

BIRD, J. Claimant's husband, William Redfield, was an employee of the Dr. Denton Sleeping Garment Mills, at Centerville. On April 18th, while so employed, he received a serious injury to one of his hands, which resulted later in an amputation of three fingers. Gangrene set in and 16 days thereafter he died. His widow petitioned the Industrial Accident Board to have her claim adjusted. Proofs were taken and an award made by an arbitration committee of $5.25 a week for 300 weeks. On appeal to the Industrial Accident Board the award was affirmed. The proceedings were then removed to this court by a Writ of Certiorari. Exception is taken to the following findings of fact, it being claimed that the testimony does not support them:

"(15). At the time of the accident there was on each of the carding machines one or more signs reading, 'Hands Off,' such being placed on the machines by the manufacturer. These carding machines are so adjusted that they operate through a system of weights, and when the weight reaches a certain point, the machine dumps down

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upon the apron; and, if a person coming near the machine should rest his hand upon it, such action would disturb the mechanism and cause the machine to dump, thereby seriously interfering with its operation. That the sign, 'Hands Off,' was put up not as a warning against danger, but to prevent people from disturbing the operation of the machines and so cause it to dump."

"(16) There were also signs posted in the room reading, 'Cleaning machinery while in motion positively forbidden.' But this did not have reference to picking off cotton while machine was in motion, caught on different parts of the machine but not in a dangerous place. Picking off accumulations of cotton while the machine was in motion was part of the duty of the operator."

It appears from the record that the deceased was engaged in the carding room, in which there were four carding machines. Each machine consisted of a picker, a breaker and a finisher. While these are different machines, they are connected together and operated as one set. The deceased had charge of one set and it was his duty to watch the yarn as it came from the carder and take care of the machines while they were in motion. The testimony tends to show that the deceased was working at the time of his injury on the finisher. The finisher consists, in part, of two cylinders with protruding ends of small wires. As the cylinders revolved in opposite directions they separated the cotton. In front of the cylinders and close to them, was a metal guard to protect the operator against injury. Sometimes the cotton would collect on this guard, and, if not removed, it would cause an imperfection in the product. The findings show that it was near this guard that the injury occurred. Exception to finding No. 16 raises the question as to whether the removing of the cotton at this point was cleaning the machines, in such a sense as to make his conduct a violation of the posted rule that, "Cleaning machinery while in motion is strickly forbidden."

Touching this question, Frank S. Cummings, who had been formerly general manager, and was at the time secretary and treasurer of the company, testified as follows:

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"Q. I will ask if when you were manager, if a little piece of cotton got close to the wire where it was not considered dangerous to pick it off, would they pick it off without stopping the machine?

"A. Any careful employee, any conscientious employee kept his machine clean.

"Q. Well, now, to get to that, would he pick off the cotton there?

"A. Yes, sir.

"Q. Where it might interfere with the product?

"A. Yes, sir; with reasonable care there was no danger.

"Q. Would you consider this sign 'cleaning machinery,' would it apply to picking off that little cotton that might injure the product—would you stop the machine for that?

"A. If it was not in a dangerous place, it did not apply to that; it was commonly done.

"Q. That is, the employees were expected to do it, weren't they, to keep them clean and pick off anything like that?

"A. Yes, sir."

Frank S. Thomas, manager of the company, testified that:

"I posted the signs all over the mill as a general precaution against accidents that might result from cleaning machinery while it was in motion. * * * The common custom, however, is in the mills to pick the cotton off from the cards, and I do not think our understanding of the words 'Cleaning Machinery,' included that.

"A. As I say, I don't think our understanding of 'cleaning machinery,' included picking off such as it was reasonably safe to pick off while the machines were in motion, because it was really impractical to handle the machines in any other way.

"Q. To stop the machines to pick off a little cotton that might be caught in there that you could reach handily would impair the product of the machine?

"A. Yes, sir; every time you stop the card, there is unevenness produced in the work, and of course, it involves a loss of time, and naturally every practicable attempt to keep the machine in continued operation is taken."

The testimony relied upon to support finding No. 15 is as follows: Speaking of the sign on the machinery, "Hands Off," the witness, Frank S. Cummings, testified:

"A. Yes, sir. Those, perhaps, if I may be permitted to explain, were never put there as an indication of danger.

"Q. Did you put them there?

"A. Yes, sir; I was here when the machines were bought, and they

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were on the machines when they were put there by the manufacturers of the machines.

"Q. You don't know why the manufacturers put them there?

"A. Surely. Simply because putting your hands on them disturbed the mechanism of the machinery. There is no danger from that. The machinery operates through a system of weights, and when it reaches a certain weight, then it dumps down on to the apron, and if anybody puts their hands in there, and disturbs the mechanism, it makes it work irregularly, and it has to be repaired, it is simply a delicate piece of machinery that ought not to be handled.

"Q. Is there any danger connected with it at all?

"A. Not a particle."

Unless there was no proof to support the finding of fact, this court has no power to interfere. The foregoing testimony affords some proof of the facts therein found. It follows, therefore, that the exceptions to these findings must be overruled.

Several legal questions are raised and discussed by appellant. Most of them rest upon the assumption that the foregoing exceptions are well taken. The exceptions having been overruled, it will be unnecessary to consider them.

A further question is raised that the death of the deceased was caused by the disease diabetes. This was a question of fact. The Board, after taking the proofs, decided that this claim was not established by the evidence. An examination of the evidence bearing upon that question convinces us that there was room for such a finding, and therefore, it must be regarded as final. In connection with this question, another one is raised, and that is the refusal of the Board to allow respondent to reopen the proofs after the day set for the hearing to permit further expert testimony to be introduced on this question. The hearing on appeal was fixed for September 9th. On that day claimant's attorney was present and was heard. Respondents did not appear, they evidently relying upon certain suggestions made by them to the Board for an adjournment. The matter was then held open until October 8th. On that day the Board gave respondents an opportunity to be heard, but refused to allow them to introduce expert testimony because

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of the absence of claimant's attorney, and further refused to allow depositions to be taken in Detroit and elsewhere, because of the added expense to claimant to have her counsel present. Section 11 of part 3 of the law gives the parties the right to be heard, and the right to introduce additional testimony on appeal. This right was given to them on September 9th. The fact that appellants' efforts to secure an adjournment, proved futile on September 9th, did not make it incumbent on the Board to grant further time in which to take additional testimony.

We think the determination of the Board should be affirmed.

MARY SPOONER,
Applicant,
vs.
DETROIT SATURDAY NIGHT COMPANY,
Respondent.

COURSE OF EMPLOYMENT—BY WHOM EMPLOYED—ARISING OUT OF.

Decedent was employed by the Winn & Hammond Printing Co. as engineer. The plant of the Detroit Saturday Night, having been injured by fire, temporary arrangements were made with the Winn & Hammond Co. for the use of their plant to get out the paper. Decedent was killed while running an elevator during the night on which respondent was using the plant. Respondent contends that decedent was not in its employ at the time of the accident, and that running the elevator was out of the course of his regular employment. It was shown that respondents entered into a contract, part of which stipulated that they were to furnish a competent engineer to attend to the engine while they had the use of the plant. They did in fact hire a man, but decedent insisted that he do the work himself, as he did not want any one else to handle his engine. This arrangement was approved by respondent.

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HELD: 1. That Spooner's work for Winn & Hammond ceased at five o'clock in the afternoon, and it was understood and agreed that he was to continue as engineer that night, and his services were to be paid for by respondent, and this under the circumstances of the case makes him an employe of the respondent.

2. That he was engaged at the time of the accident which caused his death in running the elevator with the consent of respondent's foreman who was riding therein, and Spooner's action in running the elevator must therefore be held to be within the course of his employment, and that the accident causing his death arose out of his employment.

Appeal of the Detroit Saturday Night from the decision of an arbitration committee awarding compensation to Mary Spooner for the death of her husband. Affirmed.

Opinion by the Board:

On February 3, 1913, respondent entered into a contract for the use of a portion of the plant and machinery of Winn & Hammond Company, a publishing concern of the City of Detroit, respondent's plant and place of business having been rendered untenantable by fire. The contract is in writing and was made between the Saturday Night Company and T. H. Collins, receiver for the Winn & Hammond Company, and provides the terms and compensation for the use of machinery, power and appliances in the plant and also contains the following proviso:

"It is further agreed that should the Detroit Saturday Night Company wish to operate the machinery in this plant at any time other than the stated working hours of the Winn & Hammond Company which are 7 a. m. to 11:30 a. m. and 12:15 p. m. to 5:00 p. m., that the charge for power service shall be $1 per hour in addition to the prices above quoted and that the Detroit Saturday Night Company agree to furnish a competent engineer to tend boiler and perform such other duties as usually fall to a man in that capacity."

The Saturday Night Company desired to operate the plant on the night of February 5th to get out its paper for that

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week, and some negotiations were had between the representatives of the Saturday Night Company and Receiver Collins and Mr. Spooner, who was the regular engineer of the Winn & Hammond plant, for the services of Mr. Spooner as engineer that night. Objection was made by some of the Winn & Hammond people to the proposal because the work would be too much for Mr. Spooner, and that he would be worn out and unable to do his work properly for the Winn & Hammond people the next day. Mr. Williamson, superintendent for the Saturday Night Company, employed a man by the name of Leonard J. McCabe as engineer for that night. Time and a half was allowed for night work and Spooner it seems desired the job on that account, and it is claimed that he was opposed to having any other engineer run the engine lest it might not be handled properly. McCabe came to the plant that afternoon talked with Spooner in the matter and left because the latter told him that he, Spooner, was going to run the engine that night. It is claimed on the part of the applicant that Spooner's work for Winn & Hammond Company ceased at 5 o'clock on February 5th, and from that time he was in the employ of the Saturday Night Company until he met his death at about 2 o'clock in the morning following. It is further claimed on the part of the applicant that Mr. Spooner was hired by the Saturday Night Company as engineer and that the accident which resulted in his death arose out of and in the course of his employment.

It is claimed by respondent that Spooner was not in the employ of the Saturday Night Company, but was there substantially as a volunteer because he was unwilling to have anyone else handle his engine, and that Spooner was in fact at the time of the accident in the employ of the Winn & Hammond Company. Respondent further claims that the work of running the elevator, at which Spooner was fatally injured, was entirely outside of his duties as engineer, and that his injury did not arise out of or in the course of his employment. There is no dispute as to any of the material facts in the case except the question of employment of Mr. Spooner as engineer

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that night. The place and manner of the accident are undisputed. The sole question of fact in dispute is whether or not Spooner that night was working as an employe of the Detroit Saturday Night Company.

Death having sealed Spooner's lips, the disputed fact must be determined from the testimony of others and from inferences that may be drawn from established facts and conditions.

It is undisputed that Winn & Hammond Company ceased work in the plant at 5 o'clock in the afternoon of February 5th; that the plant was operated that night by the respondent in getting out its paper; that Mr. Spooner was working that night running the engine which furnished power and light for the respondent; that the plant could not run and respondent's work could not be done without an engineer and the operation of the engine; and that Spooner was engaged in running the engine with the knowledge and approval of and pursuant to some arrangement with respondent. The duty of respondent to furnish an engineer is fixed by the written contract above referred to, and it is conceded that respondent expected to pay for Spooner's services as engineer that night, the claim of respondent being that Spooner was to act as engineer that night through an arrangement made with Receiver Collins of the Winn & Hammond Company, who was Spooner's regular employer. The precise claim as made by respondent is that it was understood that Spooner was to work as engineer that night, that Receiver Collins would "bill respondent for him," and that respondent would pay the bill for the services of Spooner as such engineer, such payment to be made to Receiver Collins of the Winn & Hammond Company. On the other hand, it is claimed by the applicant that Spooner was employed as such engineer for the night in question directly by respondent and was to be paid time and a half for his work, which would amount to approximately $5.20. It is not disputed by respondent that this amount was to be paid for the services of Spooner that night, respondents' claim being that such payment should be made to Collins as receiver,

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and that by reason of such arrangement Spooner was in fact in the employ of Winn & Hammond Company at the time he met his death. There is a sharp conflict of evidence in relation to the hiring of Spooner for the night in question between the witnesses of the applicant and the respondent, but from a careful examination of all the proofs the Board has reached the conclusion and finds as a matter of fact that Spooner, at the time of his death, was working as an employe of respondent.

The engine which Mr. Spooner was engaged in operating was located in the basement of the building, and the place where he met his death was in the elevator between the third and fourth floors of the building. It appears that it was not necessary for Spooner to remain in the basement with the engine all of the time, and he came to the floor above where respondent's employes were folding papers and putting in the inserts. Mr. Loeffelbein, foreman of the press room, was the man charged with getting out the work, and was in charge of the work at that time, respondent's superintendent being away. Loeffelbein and others desired to get some stools that were located on the fourth floor of the building to use in their work of folding. There were no lights on the stairways or on the fourth floor, and Spooner proposed to run the men up to the fourth floor in the elevator, which he had been accustomed to run at times in connection with his work as engineer. Loeffelbein and two other foremen of respondent thereupon got into the elevator with Spooner. Spooner started the elevator and while ascending to the fourth floor was caught in the gate or some other way and crushed to death. There was no light in the elevator and those with him could not tell just how the accident happened. Respondent contends that running the elevator in question was outside of the course of Spooner's employment, and that the accident which caused his death did not arise out of his employment.

The employes of the Saturday Night Company were not familiar with the building, having moved into it in an emergency caused by fire; while on the other hand, Spooner was

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familiar with the plant and had been accustomed to run the elevator frequently during his long employment with Winn & Hammond Company. It was but natural under those circumstances that Spooner should volunteer to run the elevator up to the fourth boor with Loeffelbein and Hussey and Wheeler, two other foremen of respondent, to get the stools that were wanted. The stools were to be used in doing the work of folding and putting in inserts, and the proposal of Spooner to run the elevator to the upper floor seems to be in the nature of a suggestion from him, which respondent's foreman might either have accepted or declined. Loeffelbein was foreman of the pressroom and had charge of getting out the work that night, and in the absence of respondent's superintendent, Loeffelbein was Spooner's immediate superior. Also, Spooner might naturally be expected to be governed by the orders and wishes of the other two foremen of respondent who went with him and Loeffelbein on the fatal elevator trip. The acquiescence of Loeffelbein and the other two foremen in Spooners' proposal to run the elevator for them and their approval of his action in so doing had the effect of placing Spooner in the same position as if he had been ordered by his foreman to run the elevator on this trip. He was merely doing what any helpful man accustomed to run the elevator would have done under the circumstances, and was trying to further the business and work of his employer. In the opinion of the Board the injury arose out of and in the course of his employment and the award of the arbitration committee is affirmed.

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The Spooner case was appealed to the Supreme Court and reversed, the court holding that Mr. Spooner was outside of the course of his employment at the time of the accident which resulted in his death. The full opinion of the Supreme Court is here given:

SUPREME COURT.

MARY SPOONER,
Claimant and Appellee,
vs.
DETROIT SATURDAY NIGHT COMPANY,
Defendant and Appellant.

ACTS OUTSIDE OF COURSE OF EMPLOYMENT.

Claimant's decedent was a stationary engineer in charge of the engine and dynamo in a plant leased by defendant company. Late at night while so employed he went to the first floor of the building and there met some of defendant's employes and upon their signifying an intention of going to an upper floor of the building, he volunteered his services to take them up on the elevator. While doing this he met with the injury which resulted in his death.

HELD: The act was one outside of the course of the employment and for which no liability would attach to defendant under the workmen's compensation law.

Certiorari to the Industrial Accident Board to review an award of said Board to Mary Spooner, as against the Detroit Saturday Night Company. Reversed.

Beaumont, Smith & Harris, of Detroit, for claimant.

McGregor & Bloomer; (William L. Carpenter, of counsel), all of Detroit, for defendant and appellant.

STONE, J. This is a claim made by Mary Spooner widow of James Spooner, against the Detroit Saturday Night Com-

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pany, for compensation for the death of her husband, under Act No. 10, Public Acts of 1912, known as the Workmen's Compensation Act.

The Detroit Saturday Night Company, having previously suffered a fire in its plant in the city of Detroit, on Monday, February 3, 1913, entered into a contract with the Winn & Hammond Company, through T. H. Collins, its receiver, as follows:

"Detroit, Mich., Monday, February 3, 1913.

"Agreement between T. H. Collins, Receiver for Winn & Hammond Company and the Detroit Saturday Night Company, City of Detroit, State of Michigan and County of Wayne on the 3rd day of February, 1913.

"I agree for such a period as the said Winn & Hammond Company shall be under my control and until such time as twenty-four hours' notice shall be given to the Detroit Saturday Night Company to furnish the following equipment and power for same at the prices and under the conditions named in this instrument; Cylinder press at 75 cents per hour; Gordon press at 33⅓ cents per hour; Power cutting machine at 50 cents per hour; Stitching machine at 50 cents per hour; Folding machine at 50 cents per hour; perforator at 50 cents per hour; the use of type, tones and material necessary for composition work at $3.00 per day.

"I also agree to furnish elevator service, telephone service and office service which shall consist of providing cards and keeping time of such employes as the said Detroit Saturday Night Company may assign to this plant for operating machinery rented to them at the rate of $10.00 per week.

"It is further understood and agreed between both parties that no type or other material shall be removed from the plant of the Winn & Hammond Company by the said Detroit Saturday Night Company.

"It is further agreed that should the Detroit Saturday Night Company wish to operate the machinery in this plant at any time other than the stated working hours of the Winn & Hammond Company, which are 7 A. M. to 11:30 A. M. and 12:15 P. M. to 5 P. M., that the charge for power service shall be $1.00 per hour in addition to the prices above quoted and that the Detroit Saturday Night Company agree to furnish a competent engineer to tend boiler and perform such other duties as usually fall to a man in that capacity.

"It shall be optional with the Detroit Saturday Night Company how much of this machinery they shall operate and they agree to give ample notice when any additional machinery shall be wanted or discontinued.

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"The said Detroit Saturday Night Company further agrees to abide by and perform any and all orders of the bankruptcy court concerning its occupancy and use of said property.

Signed: H. H. Nimmo,
Vice-Pres. Detroit Saturday Night Co.
Signed: Winn & Hammond Co.
Approved: Lee E. Joslyn, Referee. Per T. H. Collins."

The Detroit Saturday Night Company, in accordance with the terms of the foregoing contract, employed an engineer by the name of Leonard J. McCabe to operate the engine in said plant, on the night of February 6, 1913, that being the first night that said company operated said plant. This engineer was employed on Wednesday, February 5th. He went to the plant of the Winn & Hammond Company on Wednesday, February 5th, to look over the plant preparatory to taking charge of it on the night of February 6th. On this occasion he told James Spooner, then in charge of the plant, that he was going to take charge of the same on Thursday night, February 6th. On Thursday, February 6th, at about five o'clock, McCabe went to the plant for the purpose of taking charge that night. He saw Spooner, and the latter objected and desired, himself, to operate the engine. McCabe testified that Spooner told him that they were going to run about nine o'clock; and that he, Spooner, would run himself that night, and it was not necessary for McCabe to stay. McCabe then went away and Spooner did actually operate the engine in said plant on the night of February 6, 1913.

James Spooner, husband of claimant, was a stationary engineer in the employ of the Winn & Hammond Company, and had been in its employ as such stationary engineer for a period of twenty years, or more, prior to said February 6th. His duties were to run the engine and dynamo in the plant. It was not a part of his duties to run the elevator, but he sometimes did so for his own convenience as did other employes, in the absence of the regular elevator man, or when requested by the employer in furthering its work. On the night in question, or about two o'clock in the morning of February 7th,

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said James Spooner left his place of duty in the engine room in the basement of said plant and went to the upper floors of said building. In going to said upper floors he walked up the stairway. Upon the second floor he met Otto Loeffelbein, John C. Hussey and a Mr. Wheeler, employes of the Detroit Saturday Night Company, and stopped with them and had a casual conversation. Shortly after James Spooner came upon said second floor said Hussey and the others started to go up the stairway from the second to the third floor of said building for the purpose of getting some stools to sit upon at their work; and thereupon said James Spooner offered to take them up on the elevator, saying: "What's the use of your walking, ride up." And said Spooner did then and there open the door of the elevator which stood there, and the said employes got upon the same and Spooner operated it in such a manner as to cause it to ascend. The elevator passed one floor in safety, and just as it was passing the next floor James Spooner received the injuries which caused his death. There was no light whatever upon the elevator and the men upon it were unable to tell the cause of the accident from which Spooner suffered the injuries which caused his death.

The claimant made demand upon the appellant for payment to her of compensation because of the death of said James Spooner, under the terms of said Act. The appellant denied all liability to said Mary Spooner under said Act. An arbitration was had under the Act, and the Committee of Arbitration awarded said Mary Spooner the sum of $2,520. The appellant filed a claim of review of the decision of said committee with the Industrial Accident Board, and said decision of said committee was duly reviewed by said Industrial Accident Board, and on June 10, 1913, said board made a decision affirming the decision of said Arbitration Committee. The case is here for review upon certiorari.

The appellant insists that it did not make any contract, express or implied, of employment with said James Spooner, and that in his operation of said engine, on the night of February 6, 1913, he was acting as the employe of Winn & Ham-

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mond Company, and not as the employe of the Detroit Saturday Night.

The Industrial Accident Board, in its fourth finding of fact, found as follows:

"Mr. Spooner was engaged in operating the engine in the plant for Winn & Hammond Co. until five o'clock in the afternoon of February 6, and from that hour until he met his death, at about two o'clock in the morning of February 7, he was in the employ of the Detroit Saturday Night Company, being engaged that night in operating the plant as engineer in getting out its paper; and that Spooner at the time of the accident was in fact an employe of the Detroit Saturday Night."

It is the claim of appellant that there was no evidence whatever to support this finding of fact. The said Industrial Accident Board found, as matter of law, that the injury received by said James Spooner, and which caused his death, arose out of and in the course of his employment by the Detroit Saturday Night Company; and that said employment was not a casual employment within the meaning of said Act, so as to debar Mary Spooner from recovering compensation for the death of James Spooner.

By appropriate assignments of error the following propositions are presented by the appellant:

1. That Spooner was not an employe of the Detroit Saturday Night Company as matter of law.

2. That the injuries did not arise out of and in the course of his employment.

3. That if Spooner was an employe of the Detroit Saturday Night Company, his employment was a casual employment.

(1) On the first proposition urged by appellant, a careful reading of the evidence contained in this record leads us to the conclusion that we cannot say there was no evidence to support the finding that Spooner was an employe of the Detroit Saturday Night Company. Under the statute, as con-

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strued by this court, if there was evidence to support the finding, we will not review or weigh that evidence. Rayner v. Sligh Furniture Co., 180 Mich., 168. We think there was some evidence in support of this finding.

(2) Did the injuries arise out of and in the course of his employment?

The appellant needed, and had employed an engineer to operate the engine and dynamo upon the night in question. It was not concerned with, and did not need the use of the elevator. As matter of fact, the agreement had provided that the Winn & Hammond Company was to furnish the elevator service, but no such service was needed by appellant that night. If we are right in saying, under the first proposition, that there was evidence that Spooner was in the employ of the appellant, that employment was solely to operate the engine and dynamo. The evidence is silent as to any other duty imposed upon him by the appellant. The engineroom was located in the basement of the building; and so far as this record shows Spooner had no occasion to leave it, and had no duty to perform upon the upper floors of the building during the night of the injury. Under the evidence he had gone upon these upper floors purely and solely to visit with the men working there. The evidence is undisputed that he walked up the stairway. He owed no duty to those men, or to anybody, to take them to the upper floors upon the elevator; neither was he requested to do so. It was doubtless a friendly act upon his part, which did not tend to further the business of appellant. At the time of the injury we think that he was engaged in an act outside of, and not in the course of his employment, and the injuries he received and which caused his death, did not arise out of and in the course of his employment. The elevator shaft was in pitch darkness, by the undisputed evidence, and in using it he not only risked his own life, but that of the men he took upon the elevator with him. Had he remained in the place where his duties called him and attended to those duties, he would not have been injured, so far as this record shows. The material question is not what he had done at

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times, for his own convenience or otherwise, while in the employ of Winn & Hammond Company, but the pertinent question is: What was he employed to do upon this night? Manifestly, to run and care for the engine and dynamo. This injury occurred while he was away from his work, and while he was a voluntary visitor to the employes of the appellant, and the act was for his own pleasure or satisfaction.

Counsel for appellee in support of their claim have called our attention to the case of Miner v. Franklin County Telephone Co., (Vt.) 75 Atl. R., 653. In that case the plaintiff was an employe of the defendant Telephone Company. On the day of the accident defendant's foreman said to the linemen, of which the plaintiff was one, that they would go down and splice the cable at a certain point, and all went together to the place. On arriving there the foreman told the plaintiff and another lineman to go to a certain place and get a ladder. They were unable to get it, and the plaintiff so reported to the foreman on their return. The foreman was then on the cable seat, with his materials at hand, and was just commencing the work of splicing. After watching him awhile, the plaintiff said he guessed he would go up and help him, and received no reply. The plaintiff then ascended the pole and stood on an upper crossarm and handed the sleeves to the foreman as he needed them, the foreman taking them from him and using them as he proceeded with the splicing. After working in this manner for about twenty minutes, the foreman placed the bag containing the sleeves on the other side of him, which put them beyond the plaintiff's reach; and after looking on awhile the plaintiff said he would go down, and proceeded to do so, receiving therein the injury complained of. These were the circumstances tending to show that the plaintiff was in the performance of his duty when he received the injury. In deciding the case for the plaintiff the court said:

"The voluntary offer of a willing servant to make himself useful in a matter not covered by any express command, when the proffered service is accepted by his superior, although not by an approval ex-

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pressed in words, cannot be said as matter of law to put the servant outside the limits of his employment."

We think the case readily distinguishable from the instant case. In fact it might be said the plaintiff there was in the performance of, and carrying on the very work for which he was employed, towit: He was assisting his foreman, who undoubtedly represented the master. In the instant case Spooner was rendering no service which was either accepted by, or known to his superior, but was engaged in a voluntary, friendly act entirely outside the scope of his employment upon the night in question.

Our attention is also called by appellee to the case of McQuibban v. Menzies, 37 Scottish Law R., page 526. In that case a workman was engaged as a laborer in a steam-joinery, his duty being to carry wood from the machine-men to the joiners and to clean and sweep up the floor of the machine-room. A belt in connection with one of the machines became loose, and he went, without being asked so to do, to assist the machine-man in replacing the belt upon the shaft. At the request of the machine-man the workman ascended a ladder to try and replace the belt, and his arm being caught in the belt he was drawn up into the shaft and received fatal injuries. It was admitted that had a foreman been present he might have ordered the workman to do this act, but no other person had authority to order him to do so. *Held*, that the accident was one arising out of and in the course of his employment, in the sense of the Workmen's Compensation Act. The court said:

"The question of law which we have to decide is whether the deceased workman was injured by an accident arising out of and in the course of his employment, and although that would appear primarily to be a question of fact, there is no doubt that in cases of this kind questions of fact and law sometimes run into one another. The words 'arising out of and in the course of the employment' appear to me to be sufficient to include something which occurs while the workman is in his master's employment and on his master's work, although he is doing something in the interest of his master

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beyond the scope of what he was employed to do. The Act does not say, 'when doing the work which he was employed to perform,' but it is a fair inference that if it had been intended to limit the right to compensation to such accidents, different language would have been used from that which occurs in the Act. It must be assumed, therefore, that the Legislature used language of wider scope to include cases where a workman intervenes to do something useful and helpful to his master, although outside the special duties which he is employed to perform."

After citing cases, the court concluded:

"The action of the workman in this case appears to me to have been a natural and helpful intervention in the conduct of his master's business, and accordingly I am of the opinion that the question should be answered in the affirmative."

Here also it clearly appeared that the servant was doing something in the interest of his master, or in the language of the opinion, "something useful and helpful to his master." Such was not the fact in the instant case, as we have already stated.

Our attention is also called to language used by Ruegg in his work on Employers' Liability and Workmen's Compensation, at page 346, where that author says:

"The words 'arising out of the employment' may be satisfied if it is shown that the occupation in which the workman was engaged, though not strictly part of his duties, was being done in the mutual interest of the employer himself." Citing cases.

Here the same distinction is made which we have pointed out above. The case of McQuibban v. Menzies, supra, has been referred to an "Emergency Case." Such cases seem to be an exception to the general rule where a workman, for the protection of his master's interest, acts in an emergency. Manifestly, there was no emergency in the instant case.

We are of opinion that the cases cited by appellant are applicable to the instant case, although the contrary is claimed by appellee. Smith v. Lancashire & Yorkshire Rwy., 1 Q. B. Div., (Law Reports 1899) 141.

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In that case a ticket taker in the employ of the railway, after he had collected his tickets from a train, got upon the footboard of the train after it had started, to speak to a woman passenger, and was injured. It was held that the accident was not one arising out of and in the course of his employment. This case was disposed of upon the principle that where the workman is doing an act entirely for his own purposes, and in no way, either directly or indirectly, in the interest of his employer, then, however harmless such act may be, he loses the protection of the Act whilst he is so engaged. The court said:

"It is not that he violated a rule, but that the accident did not arise out of or take place in the course of his employment at all. It took place while for the moment he quitted his employment."

In Moore v. Manchester Lines, Ltd., 1 K. B. 417, a fireman left the ship and went ashore to procure articles which were necessary for his own convenience and comfort. On returning he fell from a ladder fastened to the ship's side and resting on the quay below. This was the only means of access to the ship. In giving judgment reversing the County Court judge who had awarded compensation, Cozens-Hardy, M. R., said:

"It seems to me he (the seaman) was outside the protection given by the Act from the moment he left the ship until he got back on the ship." See also

Lowe v. Pearson, 1 Q. B. Div., (Law R. 1899) 261;

Reed v. Gt. Western Railway, (1909) 2 Butterworth's W. C. C., 109.

Of this case Mr. Reugg says:

"It is a decision of the House of Lords, and may be said to establish finally the principle propounded in the first decision given on the words, namely Smith v. Lancashire & Yorkshire Railway Company, supra. This principle is that where the workman is doing an act entirely for his own purposes, and in no way, either directly or indirectly, in the interest of his employer, then, however harmless such an act may be, he loses the protection of the Act whilst he is so engaged."

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Many other cases might be cited to the same effect.

We are of opinion that there was no evidence to support the conclusion that the injury arose out of and in the course of Spooner's employment, and for that reason appellant is under no liability to the claimant in this case. This conclusion renders it unnecessary for us to consider the third proposition. The decision of the Industrial Accident Board is therefore reversed.

ROSE PAPINAW,
Applicant,
vs.
GRAND TRUNK RAILWAY COMPANY,
Resopndent.

INJURIES IN THE COURSE OF EMPLOYMENT—CIRCUMSTANTIAL EVIDENCE TO SHOW.

Alfred Papinaw, a section foreman in the employ of respondent, started from his home about 6:30 o'clock in the evening to mail his bi-weekly pay-roll and report to the company's Detroit office. He went along the tracks of the company where the employes of the road were accustomed to travel and where his duties in looking after the track required him to be a portion of the time. That he reached the mailing station is shown by the fact that the pay-roll and report were received at the company's office the following morning. He was not seen after the time that he started out to mail the pay-roll. About midnight his body was found on respondent's tracks cut to pieces, portions of it being frozen to the rails. The night was dark and stormy, and his body was found at a place where he might naturally have been accidentally run down on his way home from the mailing station.

HELD: That the facts and circumstances justified and required the inference that Mr. Papinaw was run down while in the dis-

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charge of his duties and that the accident arose out of and in the course of his employment.

Opinion by the Board:

Decedent was employed at Port Huron by the Grand Trunk Railway Company of Canada as a section foreman in charge of Section No. 29, extending from mile post 50 to 60 and was engaged in the daily duties of a section foreman from about 7 o'clock in the morning until 5:30 or 6 o'clock (local time) in the evening, the time varying with the season of the year. It was also his duty to patrol the track Sunday mornings; to keep lighted a yard interlocking light during the night, even to the extent of relighting it in case it went out during the night; he was subject to be called out at any time of the night in case of a wreck and to keep the switches clean in event of a storm. He had to keep the time of those in his gang and make out the pay-roll and time sheets at his home and mail the same at the Tunnel Depot, to the respondent's superintendent, for the first half of the month in time to reach the Detroit office not later than the morning of the 14th, and for the last half of the month not later than the last day of each month. His average weekly wage was $14.82. His gang consisted of three men besides himself. Decedent was furnished by respondent with blank forms upon which to make out such pay-roll.

At the time of the accident, January 30, 1914, the decedent was being paid a monthly wage of $62.50 the same to cover whatever services he rendered throughout the month, while the section hands who worked with him were paid a daily wage. He received no overtime for attending to the pay-roll and time sheets, this being a part of the general service for which he received the above monthly salary.

Decedent resided near Tappan Junction on what is called the Junction Road, about 1¾ miles west of the Tunnel Depot, which is respondent's main depot at Port Huron, and about 150 feet north of respondent's main west-bound line. Griswold Street runs east and west along the north side of

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respondent's tracks, but not parallel, said street running at a distance of about 4 blocks from the Tunnel Depot on the east, and about 2½ blocks from the main line of respondent's railway track westbound at the Junction road on the west. The house of deceased was situated on the west side of the Junction Road, and is about 150 feet north from the main line of respondents' railroad. The principal part of Griswold Street is a country road, being outside of the city limits. The railroad men, including the decedent, residing near Tappan Junction used the tracks of the respondent, going to the Tunnel Depot and returning therefrom, to such an extent that it had become a custom. It was inconvenient and considerably out of the way to go from Tappan Junction to the Tunnel Depot by way of Griswold Street.

Decedent worked until about 12 o'clock on the night of January 29, 1914, at his home making out the time sheets and pay-roll. The next day, January 30, 1914, he went to his home at about half past three in the afternoon to finish making out the pay-roll and time sheets, which he did by supper time, except signing the reports, which he did after supper. His wife, the applicant in this case, addressed the envelopes containing the reports and decedent took the same and started from his home at about 6:30 o'clock in the afternoon (local time) for the purpose of mailing them at the Tunnel Depot in accordance with his instructions. The pay-roll and reports were in fact mailed by deceased at the Tunnel Depot as appears from the fact that they were received at the Detroit office by respondent the following day in the regular course of mail. There is no direct evidence of decedent's movements from the time that he left his house with the reports and pay-roll to go to the Tunnel Depot. At about midnight his body was found on the tracks about a block and a half east of Tappan Junction all cut to pieces and lying scattered along for a distance of 75 to 100 feet, portions of the body being frozen to the track. The pieces of the body were all frozen stiff so that it was impossible to tell how long he had been dead. The night was snowing, blowing and raining. It was also dark. There

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is no direct evidence as to how decedent was struck and run over. From all the facts and circumstances it is fairly inferred that decedent while returning to his home from the Tunnel Depot after mailing the time sheets and pay-roll or while attending the switches, was struck by one of defendant's trains and killed.

It appears beyond question that in discharging his duty as section foreman he went to the Tunnel Depot and mailed the report and pay-roll and apparently was returning to his home by the route that the employes of the company were accustomed to travel, when the accident occurred. The night was dark and stormy rendering the happening of such as accident more probable than otherwise.

In the opinion of the Board Mr. Papinaw met his death by an accident which arose out of and in the course of his employment by respondent company, and his widow is entitled to recover the compensation awarded her in this case.

SUPREME COURT.

ROSE PAPINAW,
Applicant and Appellee,
vs.
GRAND TRUNK RAILWAY OF CANADA,
Respondent and Appellant.

1. MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—INDUSTRIAL BOARD.
   Findings by the Industrial Accident Board are, in the absence of fraud, conclusive, if the facts proven are capable as a matter of law of sustaining the inferences drawn therefrom.

2. MASTER AND SERVANT—INJURIES TO SERVANT—TRESPASSER.

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A foreman of a section on a railroad was required to mail out his pay rolls so that they would reach the office not later than the first of the month. He was also required to be on call during the night, and in case of storms was supposed, on his own motion, to clean switches and see that they were in proper working order. On the night of January 30, 1914, which was stormy, deceased walked down the railroad tracks to a station to mail his pay roll, and informed his wife that he might be late in caring for the switches.

HELD: That in such case, deceased, while using the tracks, was not a trespasser, but was upon the right of way in the employer's business either whether he was going to mail his reports or to visit the switches.

3. MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT.

Where the natural and reasonable inference is that the the accident happened while the deceased servant was engaged in his employment, the master has the burden of proving the contrary.

4. MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT.

In a proceeding under the Workmen's Compensation Act for compensation for the death of a section foreman run over by a train, evidence *held* to warrant a finding that deceased when killed was on the tracks in the course of his employment.

Certiorari to Industrial Accident Board.

Proceeding by Rose Papinaw against the Grand Trunk Railway Company of Canada under the Workmens' Compensation Act for compensation for the death of her husband. Compensation was awarded by the Industrial Accident Board, and defendant brings certiorari. Affirmed.

W. K. Williams, of Detroit, (*Harrison Geer,* of Detroit of counsel) for appellant.

J. C. Lehr, of Port Huron, for appellee.

STEERE, J. The husband of applicant, Alfred Papinaw, who had been for several years section foreman for respondent was killed during the night of January 30, 1914, on its track between his residence and what is called the Tunnel Depot of

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respondent's road in the city of Port Huron. On her application for compensation under Act No. 10 Pub. Acts 1912 (extra session) the Michigan Industrial Accident Board found that his death arose out of and in the course of his employment, and therefore awarded her the full compensation provided in such cases.

The known facts and circumstances relating to Papinaw's death are practically undisputed. Respondent contends that the award was erroneous because it cannot fairly be found as a matter of fact, from any competent evidence in the case, that his death did so arise.

Deceased's section commenced at what is known as Tappan Junction, which was about 1¾ miles west of the Tunnel Depot and extended several miles westerly toward Detroit. He resided with his family near the east end of his section about 150 feet north of respondent's tracks, on the west side of the Junction road, which runs north and south crossing respondent's tracks a short distance east of Tappan Junction. His daily duties as section foreman required him usually to work upon the track with his section crew from about 7 o'clock in the morning until 5:30 in the evening, the time varying somewhat with the season of the year. It was also his duty to patrol the track Sunday mornings and keep a yard interlocking light burning at night, and re-light it in case it went out during the night. Between his section and the Tunnel Depot was another section in charge of a different foreman, called the Tunnel freight yard section. In this section were numerous switches five of which near the Tappan Junction road crossing it was the duty of deceased to look after in case of storm. It was his custom when nothing out of the ordinary arose and there was no indication of storm to retire early. He was subject to be called out at any time of night in case of a wreck or to clean the switches in event a storm rendered it necessary. Another of his duties was to keep the time of his crew and daily enter it on a time book from which he made out their check pay-rolls at his home as opportunity arose, and mailed them at the Tunnel Depot to respondent's superintendent in

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Detroit. This was required to be done for the first half of each month in time to reach the Detroit office not later than the morning of the 14th and for the last half not later than the first day of the ensuing month. The section hands worked by the day, with extra pay for overtime, but section foremen were then paid monthly wages of $62.50, which covered whatever services they rendered during the month, and were required to be on call at all times. If they wished to be away beyond call over night or on Sunday they had to secure permission from the roadmaster, while the section hands were at liberty to go and come as they pleased on nights and Sundays.

There was a street, called Griswold, running east and west on the north side of respondent's tracks, but not parallel with them, at a distance of about four blocks from the Tunnel Depot and about 2½ blocks from respondent's west bound track at the Junction road near where deceased resided. This was outside of the city limits, similar to a country road. The railroad men, including deceased, who resided near Tappan Junction were accustomed to use the railroad tracks in going to and returning from the Tunnel Depot, it being more convenient and direct than by the street.

Deceased's education was limited and it was hard for him to correctly prepare his pay-rolls and reports. He worked at this task the evening before until midnight and on the afternoon of January 30, at about half-past three, returned home to complete making them out, which he practically finished about supper time. After suppper he signed the papers and his wife addressed the envelopes containing them. He then left home, at about 6:30 o'clock, for the purpose of mailing them at the Tunnel Depot, as was customary and in accordance with his instructions, that they might be received in Detroit the next day. There is no direct evidence of his movements from that time. These papers were mailed that evening at the Tunnel Depot and went out on a train which left at 6:55, being received in Detroit the following day. Sometime about midnight his remains were found by a switchman on respondent's tracks, badly mutilated and cut to pieces, portions being scat-

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tered along and frozen to the track, at a locality variously stated at from about a block and a half east of Tappan Junction to 1300 feet east of the Junction road. It was a dark, stormy night with a mixture of rain and snow flying and falling. His wife testified that he seldom went to the city at night and never to the tunnel except on the nights when it was his duty to mail his pay-rolls and reports; that on leaving this night he commented upon its being dark and stormy, telling her that if he was late she could know that he was out working on the switches.

Between when deceased left home and his remains were discovered, the time of his death is necessarily indefinite. The undertaker who was summoned shortly after their discovery and cared for the remains testified that they were strung along the track seventy-five or one hundred feet, some parts frozen to the rails or ties so that he had difficulty in loosening them; that it was a "cold, nasty, raw night," and he thought from the condition of the body, which he judged had been dead an hour and a half or two hours, that more than one train ran over him; that "one had taken him one way and another brought him back."

In considering this case we start with the well settled proposition that if the facts proven are capable as a matter of law of sustaining the inferences of fact drawn from them by the Industrial Accident Board, its findings are conclusive, in the absence of fraud, and the appellate court is not at liberty to interfere with them. Section 12 part 3 of the Industrial Accident Law has been too often and recently so construed by this court to require citation of cases. This is but an application under the statute of the comprehensive and fundamental principle universal in courts of law, that whether there is any competent evidence is for the Court to determine, but whether the evidence is sufficient is a question for the jury, the function of the accident board being in that respect those of a jury in actions at law.

This case is readily distinguishable from that line of decisions cited by respondent in which the employe by his con-

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tract of hiring was engaged to work during certain hours and was injured away from his place of employment, while going to or returning from work, or was absent during some intermission for meals, or otherwise, not then upon his employer's business nor subject to his control, at liberty for the time to go where and do what he pleased, free from any claim of the employer upon his services. Here it is shown conclusively that by his contract of hiring deceased was at the time of his death required to be within reach, liable at any time to be called to work upon the track, and in that sense on duty subject to his employer's orders and control. His wife and his fellow foreman, of the section east of his, so testified, as also respondent's supervisors of tracks who said, in part:

"The section foreman is supposed to be on call at any time, in case of trouble with the switches. * * * I gave him (Papinaw) instructions with reference to those switches because he lived near, and was the nearest man to be called. Sharrard lived near the Tunnel depot. Although it was on Sharrard's section I gave Papinaw orders that in case of storm to look after the cleaning of those switches. * * * He was supposed to be on call in case the tracks got in bad condition of repair so that he could get there without tying up traffic. * * * If the foreman has not gone to bed before it starts storming he is supposed to go out himself without being called."

Especial and extra duties rested upon deceased that night. He was required to be on call. It was a stormy night, of a kind requiring unusual vigilance as to the switches, and it was imperative that he mail his pay rolls at the Tunnel Depot before the evening train left so that they would be in Detroit on the day required. He worked upon those papers until supper time and started after supper for the Tunnel Depot to mail them, leaving word with his wife which would keep him in touch with his employer during his absence, so near as possible. It is conceded that he mailed the papers that evening and they reached their destination on time. It was his duty after mailing them to return and either be at home on call or looking after the switches near by. His last words, so far as there is any proof, show such was his intent and that he left with this duty on his mind. He was in the habit of retiring

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early when there was no indication of a storm. Under the terms of his employment it was as much his duty to return to his home, or the switches near there, after mailing the papers at the Tunnel Depot as it was to go there for that purpose. In going he started along respondent's track, and presumably went that way as was his custom and that of other employes of respondent, because it was more convenient and the distance to the tunnel shorter than by any other route. He was a section foreman whose special work was to be upon, travel along and care for his employer's track. He was not a trespasser upon its right of way in any sense which would deny relief under this act, and no question of his negligence is involved in this proceeding. The place and cause of his death are readily inferable from the facts proven. Respondent's counsel say: "He was in the act of going home at the time he was killed." If so, under the circumstances of this case he was performing a duty in the line of his employment out of and in the course of which the accident which caused his death befell him. The accident occurred while he was doing that which a man so employed can reasonably do, and ought to do, and was injured at a place on his employer's premises where under the proven circumstances his combined duties made it reasonable that he should be, and there is no proof that he was there for any other purpose than on his return in completing a trip to the Tunnel Depot, in the line of his employment, to the place where his employment required him to be on call or at work, and where he would have been during that evening but for the necessity of the trip.

This claim is by a dependent of a workman who was accidentally killed, and whose evidence is therefore not available. In *Grant* vs. *Glasgow Ry.*, 1 B. W. C. 17, it is said:

> "If in such a case facts are proved, the natural and reasonable inference from which is that the accident happened while the deceased was engaged in his employment, I think it falls on the employer, if he disputes the claim, to prove that the contrary was the case."

That an employe, not actually at work, is on duty if required

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to be at a certain place on call and ready for work, is held in *St. L. A. & T. Ry. Co.* vs. *Welsh*, 72 Texas 298, where it is said of a member of a railroad bridge gang injured while sleeping in a bunk car provided by his employer:

"The plaintiff at the time of the accident was asleep on a car belonging to the company, provided by it for that purpose, which was placed upon its sidetrack. He was liable to be called upon at any moment to go out with his gang upon duty upon the road. We think he must be held to have been upon duty at the time he received the injury. That the accident occurred when he was resting from his labors, we think makes no difference. He was subject to the call of the company at the time, and his case differs from that of other servants who engage for certain hours of employment, and who are injured during the intervals in which the master has no claim upon his services."

The Arbitration Committee and Industrial Accident Board were at liberty in determining the facts in this case to draw all rational and natural inferences from the evidentiary circumstances shown. To infer and find that the accident which resulted in Papinaw's death arose out of and in the course of his employment had evidential support, and was neither unnatural nor irrational.

The decision of the Industrial Accident Board is therefore affirmed, with costs to appellee.

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JESSIE B. CLEM,
Applicant,
vs.
CHALMERS MOTOR COMPANY,
Respondent.

INTENTIONAL AND WILFUL MISCONDUCT—CARPENTER INJURED WHILE DESCENDING FROM A BUILDING BY A ROPE INSTEAD OF A LADDER.

Applicant's decedent was employed as a carpenter by respondent and on the day of his injury was working on the flat roof of a large building which was being constructed, the roof being about 20 feet from the ground. The weather was very cold and decedent and the other men were called down from the roof by the foreman at about 9 o'clock in the forenoon for a hot coffee lunch, which it was usual to serve to the men to mitigate the effects of the cold. The means generally used for descending from the roof was an extension ladder, but decedent chose to descend by means of a rope, and in some manner lost his hold of the rope and was killed. Payment of compensation was refused on the ground: (1) That the injury is not one arising out of and in the course of the employment, and (2) that it was the result of decedent's intentional and wilful misconduct.

HELD: 1. That the act of coming down from the roof for coffee lunch at the foreman's call was in the course of deceased's employment.

2. That the dangers ordinarily incident to descending from such roof arise out of the employment, and this fact is not fundamentally changed by varying the manner and means of descending as in this case.

3. There being no proof that any order or rule forbidding the use of a rope in descending was communicated or made known to decedent, and it appearing that other employes used the rope method in descending, and that deceased used much care in letting himself down over the edge of the roof with such rope, his act did not constitute intentional and wilful misconduct within the meaning of the law.

Opinion by the Board:

On December 12, 1912, Charles S. Clem was in the employ

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of Chalmers Motor Company in Detroit and was receiving an average weekly wage of $20.65. He was a carpenter by trade and was working on the roof of the new storage building which was being erected by the company. This building was approximately 160 feet long, 150 feet wide and 19 or 20 feet high, the roof in course of construction being what is commonly called a flat roof. The day was cold and the men employed on this roof, 25 or 30 in number, were obliged to wear gloves or mittens in their work. During the few days of very cold weather at this time, the foreman provided hot coffee for the men, and at about 9 o'clock in the forenoon of each day would call them down from the roof for a hot coffee lunch. The ordinary means used by the men for ascending to and descending from the roof of the building was an extension ladder such as painters use, 20 feet in length, resting against the south side of the building and tied to it by ropes. This was the only ladder provided. The heavier material used by the men in their work was lifted to the roof by block and tackle with rope falls, and in addition to this there were about a dozen ropes from 20 to 30 feet in length which were used to pull up lighter material over the cornice of the building when needed by the men working on the roof. These ropes were located around in different places so that when material was needed at any particular place there would be a rope near at hand with which to haul it up. The ropes were lying on the roof and at places where the men happened to leave them.

At about 9 o'clock in the forenoon of December 12, 1912, the foreman called the men working on the roof to come down for hot coffee, and it appears that they proceeded to go down by way of the ladder, one following another. While others were going down in this way, Mr. Clem said to a fellow workman named Sekos. "Hold this rope and I will slip down." From this point Sekos tells the story as follows: "I was in a hurry to get down. I wanted to get down, but I just held it (the rope). Another man was behind me on the roof, but did not have hold of the rope. * * * I held the rope all right; it didn't let loose at all; it didn't break, and if he had hung on

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the rope all right he would have got down safely. I guess he lost the rope; I guess his hands were cold; he had mitts on his hands and so did I. * * * It was pretty cold; we were so cold we were going down to get some coffee."

The only other eye witness was Albert E. Glaser, the man stood behind Sekos when Clem started down the rope. Glaser testified in substance that Clem asked Sekos to hold the rope for him; that Sekos held one end of the rope; that Clem took the other end of it, went over to the edge of the roof and got down, feet first on his knees, and went down backwards, with his legs down first holding onto the rope with his hands. That he was careful about it, and that would be the most careful way to do it; Clem had gloves on his hands; it was so cold that we could not work without gloves; we were all cold at that time and fingers a little stiff with the cold; a man with fingers stiffened with the cold would not be able to hold onto a rope as he otherwise could.

Angus E. McDonald was subforeman, having charge of part of the men working on the roof. McDonald had been a sailor and used a rope instead of the ladder on going up to and down from the roof of this building probably four or five times; and on one occasion when he so used a rope, the general foreman cautioned him and the men then present not to use ropes for going up and down, but to use the ladder. There was no evidence that Clem was present at this time, or that the foreman's order not to use the rope ever reached him. It is conceded that no question as to the effect of violation of shop rules or orders is involved in this case. It is also conceded the "Coming down off the roof for coffee lunch" at the foreman's call was "in the course of Clem's employment." The issue is narrowed down to "the manner of coming down" from the roof, and the means used by Clem for that purpose. It is contended on behalf of the company that compensation should be denied because (1) the injury is not one arising out of and in the course of the employment of deceased, and (2) that it was the result of his intentional and wilful misconduct.

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The first objection, we think, cannot be sustained. It is a matter of common knowledge that carpenters' employes in the erection of a building must ascend and descend and change their positions on the building as the work requires and that they are often required to choose the means and manner of so doing. This is also shown by the proofs, attention being called to the testimony of McDonald, the sub-foreman, that it is not uncommon for men to go down a rope if there is one there, and that he would sooner go down a rope than not. We think the means and manner chosen by deceased to descend from the roof, did not place his act of descending outside of the course of his employment. Did his choice of the means and manner of descent constitute "intentional and wilful misconduct" within the meaning of the Compensation Law? Mere negligence on the part of deceased will not defeat the claim of his widow for compensation. A mistaken estimate of the risk in descending by means of a rope, or the mere choosing of means and manner of descending which were less safe than the ladder, would at most be only negligence on the part of deceased. There is no evidence of wilfulness except what might be inferred from the naked fact of choosing the rope method of descending. The evidence shows that deceased exercised much care in letting himself down over the edge of the roof with the rope. There is an entire absence of any showing of wilfulness by any act or word of deceased except as above, and we think it may be fairly said that deceased acted in the belief that he could safely descend by the rope. He fell because of losing his hold on the rope. Whether this resulted from his fingers being stiffened with cold, or from his gloves, or for some other cause does not appear. It was not impossible that by reason of frosted fingers or some other cause he might have lost his hold on the ladder, had he chosen that way of descending. We are of the opinion that the act complained of did not constitute "intentional and wilful misconduct" within the meaning of the statute, and the decision of the arbitration committee in favor of the widow is affirmed.

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This case was appealed to the Supreme Court and affirmed the following being the full opinion of the Supreme Court:

SUPREME COURT.

JESSIE B. CLEM,

Claimant and Appellee,

vs.

CHALMERS MOTOR COMPANY,

Defendant and Appellant.

1. MASTER AND SERVANT—INDUSTRIAL ACCIDENT COMMISSION—PERSONAL INJURIES—COURSE OF EMPLOYMENT.

Under the terms of Act No. 10, Special Session 1912, providing for an industrial accident board and authorizing compensation for injuries to any servant "arising out of and in the course of his employment," the provisions included a decedent who was called from the roof of a building where he was working to partake of a lunch served by the employer, and who, in descending by means of a rope that extended over the edge of the roof and within 12 or 13 feet of the ground, instead of using a ladder which was provided and was safely attached to the roof, fell and was killed; his widow's right of recovery was properly sustained by the industrial accident board.

2. SAME.

Nor was his act intentional and wilful misconduct so as to defeat the claim.

McALVAY, C. J., dissenting.

Certiorari by the Chalmers Motor Company to review a ruling of the Industrial Accident Board allowing a claim in favor of Jessie B. Clem. Submitted June 19, 1913. Affirmed January 5, 1914.

Bowen, Douglas, Eaman & Barbour, for appellant.
Shields & Shields, for appellee.

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MOORE, J. This is certiorari directed to the Industrial Accident Board of the State to review an order allowing the claim of Jessie B. Clem, widow of Charles S. Clem, deceased, for the sum of $3,000 against the contestant. The claim is made under the employers liability act, so called, being Act No. 10 of the Public Acts of the Special Session of 1912.

Charles S. Clem sustained injuries by falling while descending from the roof of a building in the course of construction by means of a rope. It is conceded if there is any liability that the compensation of $3,000 is a correct sum to be paid. Following the death of Mr. Clem, an arbitration was had before an arbitration committee, which allowed the claim. An appeal was taken to the Industrial Accident Board, which board affirmed the award of the arbitration committee.

The record shows Mr. Clem had worked for some weeks as a carpenter for the Chalmers Motor Company. On the day of the accident he was assisting in placing roof boards upon a building which was 150 feet wide, 160 feet long, and 19 or 20 feet high from the ground to the eaves. It was a flat roof. Between 9 and 10 o'clock the men were instructed by a sub-foreman to come down from the top of the building for a coffee lunch, so called. The men went to and from the roof in the course of the work by means of a ladder which was attached firmly to the side of the building, extending from the ground to the roof. There were on the roof of the building some loose ropes. These were used for the purpose of raising and lowering material. They were not provided for men to go up and down. On the call being made to come for the coffee, all of the men descended by the ladder but Mr. Clem and two fellow workmen named Sekos and Glaser. Instead of going down the ladder, Mr. Clem picked up one of the loose ropes about 20 feet long and gave one end of it to Sekos, directing him to hold it in his hand. The rope extended over the edge of the roof about seven feet. Taking the rope in his hands, Mr. Clem passed over the edge of the roof and disappeared from the sight of the two men on the roof. If any one saw what happened after that, it does not appear in the record further than that

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Mr. Clem fell and was hurt, receiving injuries which resulted in his death.

The following appears in the record:

"Mr. Kinnane: Now, is it contended that the act of coming down off the building to coffee lunch when they were called by the foreman for that cause was not in the due course of their employment? I am not speaking of the manner of doing it but the fact of their coming down and going back.

"Mr. Rogers: I concede that was a part of his employment.

"Mr. Kinnane: Then it would simmer down to the manner of coming down, would it not?

"A. Yes.

"Mr. Kinnane: That would be the only matter at issue?

"Mr. Rogers: Yes. My point on that matter as to that act: When the man was doing that act he was not in the course of his employment."

It is the claim of appellant (we quote from the brief):

"(1) Charles S. Clem, the deceased, did not receive a personal injury arising out of and in the course of his employment.

"(2) He was injured by reason of his intentional and wilful misconduct."

The statute involved here is of such recent date that its construction has never been before this court. Statutes of a similar character are so recent that there is a paucity of decisions relating to them, especially in the American courts. Counsel cite a number of English and Scotch cases, but none of them is on all fours, nor is the principle of law stated in them controlling in the case before us.

The case now in this court is one of the first impression. The title of Act No. 10, Public Acts of Special Session of 1912, reads as follows:

"An act to promote the welfare of the people of this State, relating to the liability of employers for injuries or death sustained by their employees, providing compensation for the accidental injury to or death of employees and methods for the payment of the same, establishing an industrial accident board, defining its powers, providing for a review of its awards, making an appropriation to carry out the provisions of this act, and restricting the right to compensation or damages in such cases to such as are provided by this act."

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We quote from the act:

"The people of the State of Michigan enact:

"PART 1.

"Modification of Remedies.

"SECTION 1. In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injuries so sustained, it shall not be a defense: (a) That the employee was negligent, unless and except it shall appear that such negligence was wilful; (b) that the injury was caused by the negligence of a fellow employee; (c) that the employee had assumed the risks inherent in or incidental to, or arising out of his employment, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances.

"SEC. 2. The provisions of section one shall not apply to actions to recover damages for personal injuries sustained by household domestic servants and farm laborers.

"SEC. 3. The provisions of section one shall not apply to actions to recover damages for the death of, or for personal injuries sustained by employees of any employer who has elected, with the approval of the industrial accident board hereinafter created, to pay compensation in the manner and to the extent hereinafter provided.

"SEC. 4. Any employer who has elected, with the approval of the industrial accident board hereinafter created, to pay compensation as hereinafter provided, shall not be subject to the provisions of section one; nor shall such employer be subject to any other liability whatsoever, save as herein provided for the death of or personal injury to any employee, for which death or injury compensation is recoverable under this act, except as to employees who have elected in the manner hereinafter provided not to become subject to the provisions of this act."

The appellant elected to come within the provisions of the act.

Sections 1 and 2, pt. 2, of the act, read in part as follows:

"SECTION 1. If an employee who has not given notice of his election not to be subject to the provisions of this act, as provided in part 1, section 8, or who has given such notice and has waived the same as hereinbefore provided, receives a personal injury arising out of and in the course of his employment by an employer who is at the time of such injury subject to the provisions of this act, he shall be paid compensation in the manner and to the extent hereinafter provided,

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or in case of his death resulting from such injuries such compensation shall be paid to his dependents as hereinafter defined.

"SEC. 2. If the employee is injured by reason of his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act."

We have quoted sufficiently from the act to show that it is a very marked departure from the old rule of liability on the part of the employer to the employee. It is clear that as to the employer, who has accepted the provisions of the act, the risks of the employee, arising out of and in the course of his employment, are not assumed as heretofore by the employee but must be compensated for according to the provisions of the act, unless the employee is injured by reason of his intentional and wilful misconduct.

The first question then is: Did Mr. Clem receive a personal injury arising out of and in the course of his employment? And the second question is: Was he injured by reason of his intentional and wilful misconduct? The questions are so interwoven that they may well be discussed together. Mr. Clem, with others, was employed on a December day constructing a flat roof on a large building only 19 or 20 feet high. It would add not only to the comfort of these men but to their efficiency as workers to have them about 9 or 10 o'clock partake of a luncheon, which, from the fact that hot coffee was served, was called a coffee lunch. The luncheon was ordered by the foreman of the company. It was prepared on the premises, and when it was ready the men were directed by the subforeman to go and partake of it. All of them started to do so. They did not in doing so leave the premises of the appellant. All of them but three went down the ladder. Mr. Clem went down the rope which projected over the eaves seven feet. If he had kept hold of the rope until he reached the end of it, if he was a man of ordinary height and his arms were of the ordinary reach, his feet would be within five to seven feet of the ground. If, when the call to come to lunch was made, Mr. Clem, in responding to the call, had inadvertently stepped into an opening in the uncompleted roof or in company with the

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others had, in the attempt to reach the ladder, got too near the edge of the roof and fallen and been hurt, would it be claimed that the injury did not arise out of and in the course of his employment? The getting his luncheon under the conditions shown was just as much a part of his duty as the laying of a board or the spreading of the roofing material. The injury, then, having arisen out of and in the course of his employment, can it be said that compensation should be defeated because of his intentional and wilful misconduct? His primary object was like that of all the other men, to get to and partake of his luncheon. There is nothing to indicate that he intended or expected to be hurt. Nearly all the other men went down by the ladder. He went down by a rope where, if his plans had carried he would have had to make a drop of only five to seven feet. Is that such intentional and wilful misconduct as to defeat compensation under the act? There is scarcely a healthy, wide-awake ten-year-old boy who does not frequently take a greater chance and without harm. For a man accustomed to physical toil, judged by what is occurring daily, it cannot be said that such an act should be characterized as intentional and wilful misconduct within the meaning of the statute.

The allowance of the claim is affirmed.

BROOKE, KUHN, STONE, OSTRANDER, BIRD and STEERE, JJ., Concurred with MOORE, J.

MCALVAY, C. J. (dissenting). I think that the cause of the injury to the deceased was his intentional wilful misconduct and therefore cannot concur in this opinion.

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SUPREME COURT.

JANE E. HOPKINS,
Claimant and Appellee,
vs.
MICHIGAN SUGAR COMPANY,
a Michigan Corporation, and
NEW ENGLAND CASUALTY COMPANY,
a Massachusetts Corporation,
Defendants and Appellants.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—ACCIDENT ARISING OUT OF EMPLOYMENT.
To justify an award of compensation to an injured employee the accident must have arisen out of as well as in the course of his employment; the two are separate questions to be determined by different tests: "out of" points to the cause or source of the accident, while "in the course of" relates to time, place, and circumstance.

2. SAME—RELATION OF SERVANT—INJURIES OUTSIDE OF EMPLOYMENT.
Where the decedent was in the employ of the defendant as its chief engineer, and had supervision of the installation of machinery in several of defendant's plants at different cities, an injury received while he was preparing to board a car in the street by slipping and falling upon icy ground in a city in which his principal office and the main plant of his employer was situated, was not an injury which arose out of his employment under Act No. 10, Extra Session 1912 (2 How. Stat. [2d. Ed.] § 3939 *et seq.*), although decedent had spent the day at one of the branch factories in a distant town from which he had returned to the city in which he resided.

Certiorari to the Industrial Accident Board. Submitted November 11, 1914. Decided January 4, 1915.

Jane E. Hopkins presented a claim against the Michigan Sugar Company for compensation for the death of her husband. An order granting compensation is reviewed by contestant on certiorari. Reversed.

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Brooks & Cook (*Hal H. Smith,* of counsel), for claimant.

Frank J. Riggs, (*Martin J. Cavanaugh,* of counsel), for defendants.

STEERE, J. The proceedings in this case, brought here for review by certiorari, arose under Act No. 10, Pub. Acts 1912 (Extra Session); (2 How. Stat. [2d Ed.] § 3939 *et seq.*), and involve the validity of an award, by the State Industrial Accident Board, of compensation to claimant for the death of her husband on February 13, 1913, against his employer, the Michigan Sugar Company, defendant.

It appears from the finding of the Board, supported by competent evidence, that deceased was in the employ of said company as its chief engineer, supervising the installation of machinery in, and operation of, six of its plants located at Saginaw, Bay City, Alma, Croswell, Caro and Sebewaing. He resided at Saginaw, had a desk at the office of the company in that city and did work there from time to time, but had no regular office hours, and was engaged much of his time visiting and looking after the different factories, as directed or as circumstances might require. He received an annual salary, with his traveling expenses paid when going on business of his employer. He sometimes started from the office and at other times from his home when making such trips.

On February 4, 1913, he left Saginaw in the morning for Sebewaing, to visit the company's plant at that place. A train arrived at Saginaw from Sebewaing at 5:40 P. M. About 6:40 he arrived home with an injury to his head, which was bleeding a little at the back and which his wife cared for. He detailed to her, and subsequently to others, how it occurred. No one is shown to have seen the accident. He spent most of the following day at the office and the day after attended a funeral in Bay City. During those two days he appeared unwell, complained of a severe headache, and in speaking of it told of the accident to which he attributed it. From that time he grew worse, suffered a partial paralysis, with other symptoms of

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brain pressure, and died on February 13th. Without details, the testimony of physicians showed that his death was caused be a hemorrhage resulting from a small fracture about one-half inch long extending from the vertex of the skull toward the right ear.

It is claimed and found by the Board that upon arriving at the station in Saginaw, upon his return in the evening from Sebewaing, deceased found no street car in sight and started to walk along Washington Street in the direction of both his home and the company's office; that after he had walked a number of blocks he saw a street car coming and started from the sidewalk intending to take it; that the ground there was icy and covered with snow, and he slipped and fell, receiving the injury which eventually resulted fatally. Material parts of this finding are challenged as unsupported by any competent evidence; no witness being shown to have seen the accident. Much clearly incompetent and purely hearsay evidence produced by claimant was admitted in regard to it, some of which showed that deceased ran to catch the car and did not notice the ice until, in hurrying over it, he slipped and fell.

Conceding, however, as contended by claimant, that facts and circumstances properly proven, together with the report of accident made by the defendant company to the Industrial Accident Board as required by statute, furnish sufficient evidential support for the findings and, accepting them as true, we are yet impelled under the authorities, to the view that such findings fail to sustain the conclusion of law by the Board that such accident was naturally or peculiarly incidental to and arose out of deceased's employment.

To justify an award under this act it must be shown that the employee received "a personal injury arising out of and in the course of his employment." This provision is adopted in identical words from the English workmen's compensation act and presumably with the meaning previously given it there.

It is well settled that, to justify an award, the accident must have arisen "out of" as well as "in the course of" the

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employment, and the two are separate questions to be determined by different tests, for cases often arise where both requirements are not satisfied. An employee may suffer an accident while engaged at his work or in the course of his employment which in no sense is attributable to the nature of or risks involved in such employment, and therefore cannot be said to arise out of it. An accident arising out of an employment almost necessarily occurs in the course of it, but the converse does not follow, 1 Bradbury on Workmen's Compensation, p. 398. "Out of" points to the cause or source of the accident, while "in the course of" relates to time, place, and circumstances. *Fitzgerald* vs. *Clarke & Son,* 2 K. B. (1908) p. 796.

The same provision, in the same words, is found in the Massachusetts Workmen's Compensation Act. In *McNicols' Case,* 215 Mass. 497, (102 N. E. 697), the controlling question was whether fatal injuries received by an employee through blows and kicks administered by a fellow-workman, "in an intoxicated and frenzied passion, arose out of the employment. It appearing that the assaulting fellow-servant, with whom deceased was required to work, was, when in liquor, known to be quarrelsome and dangerous, and unsafe to be permitted to work with his fellow employes, the court held that "a natural result of the employment of a peaceable workman in company with a choleric drunkard might have been found to be an attack by the latter upon his companion;" but if the assaulter had not been an employe, though the injury would yet have been received in the course of the employment it could not have been said to have arisen out of it. *Mitchinson* vs. *Day Bros.,* Workmen's Compensation Reports (1913), p. 324. In that connection, recognizing as controlling authority, and differentiating, many cited English cases upon the subject, the court thus clearly and comprehensively states the rule:

> "It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of' the employment when there is apparent to the rational mind, upon consideration of

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all the circumstances, a casual connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appar to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence."

The question of whether deceased was in any sense within the ambit of his employment at the time and place of the accident is a serious one; but conceding that the injury befell him while in the course of his employment, can it be fairly traced to his employment as a contributing, proximate cause, or did it come from a hazard to which he, in common with others, would have been equally exposed apart from the employment? No direct casual relation is claimed in the particular that the nature of the business of manufacturing sugar in itself exposes its employes to unusual risk or danger of accident of this nature. All that can be claimed is that the accident resulted from the understood extra hazard to which those who travel are exposed, and, while traveling in his employer's business he was protected against accidents attributable to that extra danger.

Deceased's home and headquarters were in Saginaw. He had a desk in the office of the company where he did some work. One of the six factories he supervised was in Saginaw. His traveling consisted of journeying to the other five factories from time to time as occasion required. On the day in question he had made such a journey to Sebewaing and returned to Saginaw in safety. At the time of the accident he was in his home city, walking along the street, exposed to no

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more or different hazards of travel than any other citizen, nor than he would have been had he spent the day at the company's office or its Saginaw plant. How is the legal aspect of the case affected by his having gone to Sebewaing during that day when it appears that his duties of the day were ended and he had returned safely to Saginaw? At the time of his accident he was passing on foot along a familiar highway, upon which was ice and snow—a natural condition of that season of the year—involving an increased risk and added danger of falling, common to all and known to all. When he slipped upon the snow-covered ice and fell, he was not riding upon nor getting on or off any conveyance, public or private. No person or thing connected with transportation or travel touched or threatened him. While it is indicated by the record that he desired to take a street car and was walking or running towards one for that purpose, to assert that he was injured in attempting to take or board a car would be a misleading overstatement. He slipped and fell before reaching it, apparently such a distance away as not to attract the attention of those on the car, as no witnesses to the accident were produced. The Board found that "he started from the sidewalk towards the car with the intention of boarding the same" and the employer's report, which is the legal basis of such finding, shows that he fell "about one-third distance between sidewalk and car track." The car was presumably somewhere on the track at the time but just where is not disclosed.

Slipping upon snow-covered ice and falling while walking, or running, is not even what is known as peculiarly a "street risk;" neither is it a recognized extra hazard of travel or particularly incidental to the employment of those who are called upon to make journeys between towns on business missions.

These distinctions are recognized and the rule correctly stated in an opinion of the Michigan Industrial Accident Board filed in *Worden* vs. *Commonwealth Power Company,* 20 Det. Leg. News, No. 39 (Dec. 27, 1913), as follows:

"It must also appear that the injury arose out of the employment and was a risk reasonably incident to such employment, as distin-

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guished from risks to which the general public is exposed. To illustrate: * * * On the other hand it might be fairly said that one of the most common risks to which the general public is exposed is that of slipping and falling upon ice. The risk is encountered by people generally irrespective of employment. * * *."

The Board also referred to the fact that claimant was upon his own premises, as of some force, but apparently denied an award upon the ground quoted, which is well supported by former decisions.

In the late case of *Sheldon* vs. *Needham,* W. C. & Ins. Rep. of 1914, p. 274, a servant sent to mail a letter slipped in the street, upon a banana peel or some other slippery object, breaking her leg. Citing as controlling several cases involving the same principle, the court held that, although claimant was in performance of the exact thing ordered done, there could be no award because the accident was not due to any special or extra risk connected with and incidental to her employment, but was of such a nature as to be equally liable to happen under like circumstances to any one in any employment, and whether employed or not. This unfortunate accident resulted from a risk common to all, and which arose from no special exposure to dangers of the road from travel and traffic upon it; it was not a hazard peculiarly incidental to or connected with deceased's employment, and therefore is not shown to have a casual connection with it, or to have arisen out of it.

For the foregoing reasons we are impelled to the conclusion that the order and award of the Industrial Accident Board in the premises cannot be sustained.

Reversed.

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SUPREME COURT.

RACHEL PINEL,
Claimant and Appellant,
vs.
RAPID RAILWAY SYSTEM,
Respondent.

MASTER AND SERVANT—WORKMEN'S COMPENSATION—DEPENDENT RELATIVES—PARENT AND CHILD.

A woman who has been receiving no support from her son, and who was not dependent upon him, is not entitled to compensation for his death in the course of his employment under Act No. 10, Extra Session 1912, 2 How. Stat. (2d. Ed.) § 3953; since it is apparent that the son is not under legal obligation to support his parents until an order of the court has been made requiring him to contribute thereto. 2 Comp. Laws, § 4487 (2 How. Stat. [2d Ed.] 3478). The situation as to the dependency is to be determined as of the date of the accident to decedent. Act No. 10, Extra Session 1912, § 7.

Certiorari to the Industrial Accident Board. Submitted April 21, 1914. Decided January 29, 1915.

Rachel Pinel presented her claim against the Rapid Railway System, a corporation, for compensation caused by the death of her son, while he was employed by said company. An order denying an award of compensation is reviewed by claimant on certiorari. Affirmed.

Devine & Snyder, for claimant.

Corliss, Leete & Moody, and *Benjamin S. Pagel,* for contestant.

BIRD, J. Edward Pinel was in the employe of the respondent, and was killed while in such employment on May 29, 1913. He left him surviving neither widow nor child. He left a mother 83 years of age, who is claimant herein, and several brothers and sisters. Application was made to the In-

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dustrial Accident Board on behalf of claimant for an award. After hearing the proofs the award was denied by the Arbitration Board, on the ground that claimant was not dependent on the deceased. On appeal to the Industrial Accident Board, the same result was reached. The claimant has a life lease on a farm of 87 acres in Macomb county. Her son Charles resides with her. The deceased, Edward, and his brother Thomas were the owners of a mortgage against the farm, and more or less litigation has ensued in the past few years between them and claimant, and as a result thereof they have been unfriendly. It is not contended that the claimant was dependent upon the deceased by reason of any contributions made to her by the deceased, but by reason of the fact that he was a son who might be compelled to contribute to her support by 2 Comp. Laws, Sec. 4487 *et seq* (2 How. Stat. [2d Ed.] Sec. 3478 *et seq.*)

The question, therefore, presented is whether the claimant was a dependent on the deceased within the meaning of the compensation law, by reason of the provisions of 2 Comp. Laws. Sec. 4487 *et seq.* (2 How. Stat. [2d Ed.] Sec. 3478 *et seq.*)

Section 7 of part II of the compensation law provides that:

"Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the accident to the employe, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent change in conditions." Act No. 10, Pub. Acts 1912.

The claimant did not belong to the class conclusively presumed by the compensation law to be a dependent. On the date of the accident it is conceded claimant was not dependent by reason of any support furnished to her by the deceased. On the date of the accident she was not dependent on the deceased by force of any order of court based upon section 4487 *et seq.* A son is always under moral obligation to assist his indigent mother, but he is under no legal obligation to do so until proceedings under the statute have resulted in an order

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compelling him to do so. No such order was in force at the time of the accident; therefore we must conclude that he was under no legal obligation at that time to support his mother. See *Rees vs. Navigation Co.* 87 L. T., 661, 5 W. C. C. 117; *Schwanz* vs. *Wujek,* 163 Mich. 492, (128 N. W. 731). The most that can be said of the statute with reference to the question involved, is that by its terms a court of competent jurisdiction might have, under certain contingencies, compelled the deceased, if able, to contribute to the support of his mother. The contention of claimant cannot be sustained.

The order of the Board will be affirmed.

SUPREME COURT.

KATHERINE M. KLAWINSKI,
Applicant and Appellee,
vs.
LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY,
Respondent and Appellant.

MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—COURSE OF EMPLOYMENT—RAILROADS—PERSONAL INJURIES.

A section laborer upon a railroad who had taken refuge in a barn during a storm was not entitled to compensation under the employer's liability law for his death caused by a stroke of lightning which struck the barn: the injury or accident did not arise out of or in the course of his employment, nor was death by lightning peculiar to the industry or occupation in which he was engaged. Act No. 10, Extra Session 1912 (2 How. Stat. [2d. Ed.] §3939.)

Certiorari to the Industrial Accident Board. Submitted June 18, 1914. Decided April 19, 1915.

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Katherine M. Klawinski presented a claim against the Lake Shore & Michigan Southern Railway Company for the death of her husband in defendant's employ. From an order awarding compensation respondent brings certiorari. Reversed.

Angell, Boynton, McMillan, Bodman & Turner, for appellant.

W. Glenn Cowell, for appellee.

McALVAY, J. In its return to a writ of certiorari in this cause the Industrial Accident Board certifies, as follows:

"That at the time of the injury for which compensation was sought herein, to wit: on the 15th day of May, 1913, respondent had accepted to become subject to the terms of Act No. 10, Pub. Acts 1912 (Special Session), commonly known as the 'Workmen's Compensation Law.' That on the 28th day of July, 1913, said Katherine Klawinski made application to the board of arbitration of a claim to compensation from respondent for the death of her husband, Frank Klawinski, on the 15th day of May, 1913, while in its employ. That a Committee of Arbitration was duly formed which, after hearing the parties, made an award that respondent pay to said applicant the sum of $5.24 per week for a period of 300 weeks. That thereafter an appeal was taken by respondent from such award to said board on the ground that deceased did not receive an injury arising out of and in the course of his employment. That on the 20th day of November, 1913, an order was made by said board, affirming the award of said committee. The facts involved in this cause appear in the agreed statement hereto attached. The board does certify that said statement of facts is correct."

The following is the stipulation adopted by respondent board as its finding of facts in the case:

"STATE OF MICHIGAN—Before the Industrial Accident Board.

"Katherine Klawinski,
Applicant,
v.
"Lake Shore & Michigan Southern Railway Company,
Respondent.

"It is hereby stipulated and agreed between the parties hereto by their respective attorneys that the facts out of which controversy in

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the above entitled cause arises and which it is desired may be made a part of the return to the writ of certiorari heretofore issued from the Supreme Court in this cause to said Industrial Accident Board, are as follows:

"Frank Klawinski, applicant's husband, was employed prior to and on the 15th day of May, 1913, by respondent as a section laborer. On said date he was working as a member of a section gang of six men on respondent's roadway near Bronson, Mich. During the afternoon of that day a violent wind and rain storm arose. The foreman of the gang said, 'Boys, we better get out of the storm.' There was a barn near by, where the section gang had been in the habit of taking refuge from storms. The assistant foreman said, 'Come and go to the barn.' The foreman directed one of the men, named Kolassa, to go for the coats and waited for him. While he did so, the rest of the gang, including Klawinski, went to the barn, the foreman and Kolassa going to a nearby tenant house. While in the barn, and during said storm, Klawinski was killed by a bolt of lightning. During the time the men were in the barn no work was performed. At such time as they had previously gone in this barn for shelter the men had been paid for their time and were so paid on this occasion. The assistant foreman was subject to the authority of the foreman and had charge of the men during his absence. It was in the presence of the foreman that he said, 'Come and go to the barn.'"

The only contention in the case made by appellent is that the death of Frank Klawinski, for which compensation is asked by and was granted to his widow, did not result from "a personal injury arising out of and in the course of his employment," and within the meaning of the workmen's compensation law, and therefore the Industrial Accident Board erred in affirming the award of the committee of arbitration.

The proposition is fundamental that a claimant is entitled only to an award of compensation for "a personal injury arising out of and in the course of his employment." To determine whether the injury in the instant case is within the meaning of the law and arose "out of and in the course of his employment" we must consider the nature and character of that employment.

Decedent was employed at the time as a section laborer, one of a section gang of six men, working upon defendant's roadway at the usual and ordinary work performed by railroad section men, in which it may be said as a general propo-

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sition there is no use of or work performed in connection with electrical machinery or appliances, nor any unusual proximity to such machinery or appliances. There is no doubt that it was the legislative intent to compensate workmen for injuries resulting from industrial accidents, and that such compensation is charged against the industry because it is responsible for the injury.

As far as the instant case is concerned the scope of the English statute may be considered identical with the Michigan workmen's compensation law. Several cases have been passed upon by the English courts arising under the English law where compensation was sought for injury by lightning and, except in cases where the employment necessarily placed the employee at the time of his injury in a position subjecting him to unusual risk from lightning, compensation has been denied.

In a case identical with the instant case, where a workman employed as a road laborer picking stones and clearing out gutters along a highway, during a thunderstorm was killed by lightning, the court held that the accident causing death did not arise out of the workman's employment. The court said:

"I am unable to find any special or peculiar danger from lightning to which these men (deceased and his companion) were exposed from working on the road. No expert or other evidence was offered to me that their position on the road exposed them to any greater risk of being struck by lightning than if they had been working in a field or a garden or a factory. The antecedent probability that they would be struck by lightning was no greater in their case than it was in the case of any other person who was within the region over which the thunderstorm passed."

Kelly v. *Kerry County Council*, 42 Ir. L. T. R. 23, 1. B. W. C. C. 194.

This question has been before the industrial commission of Wisconsin in the case of *Lindauer O'Connel Co.* vs. *Hoenig*, where the widow of John Hoenig, who came to his death by a stroke of lightning while he was employed by the Company at

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work on a dam in the Fox River, taking planks out of the water above the dam, filed a claim for compensation on account of his death. Among other things, the commission found as a fact that "at the time and place of the injury to John Hoenig resulting in his death, deceased was not exposed to a hazard from lightning stroke peculiar to the injury (industry), or substantially differing from the hazard from lightning of any other out-of-door work," and, further, that his death "was not proximately caused by any accident within the meaning of the term as used in chapter 599, Laws of Wisconsin, 1913." In a memorandum opinion filed in the case, the commission, among other things, said:

"Lightning stroke is not popularly spoken of as an accident where it comes from the action of the elements without the agency of man. When the agency (industry) through the agency of man combines with the elements and produces injury to the employee by lightning stroke, it may well be said that the injury grows out of the employment and is accidental. Such has been the decision of the English courts under the English compensation act. We are aware that the language of the English act differs from the language of our act, but if we accept the construction of the legislative committee which drew the act, then we find the meaning of the two acts in this respect identical. Clearly, the industry may be and ought to be charged with the burden resulting from hazards of the industry itself. * * * We have no desire to pass on the question of public policy. That function is wholly within the province of the legislature. We merely desire to correctly interpret the legislative intent. The legislative committee in its report says that 'compensation shall be paid when the injury grows out of the employee's employment—it makes no difference who is to blame; it is sufficient *that the industry caused the injury*.' So in the case of lightning stroke, if we can find as a fact that the injury grew out of the employment, or that the industry caused the injury, then undoubtedly compensation should be paid.

"Assuming the law to provide compensation for industrial accidents only—those growing out of the employment and caused by the industry—we must approach the consideration of each case of injury by lightning on the question of fact. Did the injury grow out of the employment and did the industry cause the injury? The act provides for compensation for 'personal injuries accidentally sustained * * * where the injury is proximately caused by accident.' We are of the opinion that this language refers to industrial accidents; those caused by the industry and chargeable to the industry, and does not apply to

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injuries resulting from those forces of nature described in the common law as acts of God, such forces as are wholly uncontrolled by man."

The prayer for compensation was denied and the case dismissed.

Our quotations from the foregoing opinion are made from a certified copy which was furnished the court by counsel for appellant, who stated that they were unable to find that the opinions of the industrial commission of Wisconsin were officially published.

It is our opinion that in the instant case claimant's husband did not come to his death as the result of "a personal injury arising out of and in the course of his employment," within the meaning of the workmen's compensation law. It is clear from the stipulated facts that this injury was in no way caused by or connected with his employment through any agency of man which combined with the elements to produce the injury; that plaintiff's decedent by reason of his employment was in no way exposed to injuries from lightning other than the community generally in that locality.

Under the stipulated facts in the case the Industrial Accident Board was in error in affirming the award of the committee of arbitration, and its decision and determination is hereby reversed and set aside.

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SUPREME COURT.

CHARLES WEAVER,
Appellee and Claimant,
vs.
MAXWELL MOTOR COMPANY,
Defendant and Appellant.

MASTER AND SERVANT—INJURIES TO SERVANT—COMPENSATION.

Act No. 10, Pub. Acts 1912, pt. 2, § 9, provides that, while the incapacity for work resulting from an injury is total, the employer shall pay a weekly compensation equal to one-half of the employe's wages, but not to exceed $10. Section 10 declares that, while the incapacity is partial, the injured employe shall be entitled to compensation equal to one-half the difference between his average weekly wages before the injury and those he is able to earn thereafter, that for the loss of an eye he shall recover as compensation 50 per cent of the average weekly wages during 100 weeks, and that the loss of both eyes or both legs shall constitute a total and permanent disability. The claimant had in a previous accident lost one eye. Thereafter he lost his remaining eye.

HELD: That the injury could not be considered as a total disability, and he was entitled only to one-half of his weekly wages for 100 weeks.

Certiorari to Industrial Accident Board. Proceedings by Charles Weaver, under the Workmen's Compensation Act, against the Maxwell Motor Company, to obtain compensation for personal injuries. The claimant was awarded compensation by the Industrial Accident Board, and the employer brings certiorari. Remanded for further proceedings.

Fred L. Vanderveer of Detroit (*Cummins, Nichols & Rhoads* of Lansing, of counsel), for appellant.

Person, Shields & Silsbee, of Lansing, for appellee.

MOORE, J. This case is certiorari to the Industrial Acci-

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dent Board. The facts are stipulated. We quote sufficiently for the purposes of this case:

"The character and nature of the injury and the result thereof is as follows: The end of a crowbar struck me in the left eye, causing an injury which has permanently destroyed the sight of this member. Due to an injury received about seven years ago while working in a dye works, applicant received an injury which cost him practically the total loss of sight of the right eye. At the present time the sight of both eyes is limited only to a perception of light. Applicant received no injury to his right eye due to the accident of July 3rd, 1913, to the left eye. * * *

"Applicant contends that by reason of the loss of his left eye, due to the accident of July 3rd, 1913, and the loss of the right eye, due to the accident of some seven years ago that he is now totally and permanently incapacitated from work and therefore entitled to compensation up to the limit allowed by the act, viz: four thousand dollars. Respondent claims that it is liable only for the injury which was received while in its employ, viz: the loss of the left eye, and should pay compensation for but one hundred weeks for a total amount of one thousand dollars."

The ruling of the Industrial Accident Board was as follows:

"This cause having come on to be heard before the full board on stipulation and waiver, agreeing among other things that the applicant by the accident in question lost the sight of his only eye, the result being blindness and total incapacity for labor, and the same having been argued by counsel and written brief filed therein, and due consideration thereof having been had by the board; it is ordered and adjudged that said applicant is entitled to receive and recover from said respondents compensation at the rate of $10.00 per week for a period of four hundred weeks from the date of accident in said cause, said compensation to be paid in weekly payments in accordance with the provision of the Workmen's Compensation Law."

The questions involved call for a construction of portions of Act 10 Extra Session of 1912.

Section 9, Part 2 of the Act reads:

"While the incapacity for work resulting from the injury is total, the employer shall pay or cause to be paid, as hereinafter provided, to the injured employe, a weekly compensation equal to one-half his average weekly wages, but not more than $10.00 nor less than $4.00 a week; and in no case shall the period covered by such compensation

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be greater than five hundred weeks, nor shall the total amount of all compensation exceed $4,000."

Section 10, of Part 2, provides in part as follows:

"While the incapacity for work resulting from the injury is partial, the employer shall pay or cause to be paid, as hereinafter provided, to the injured employe, a weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than $10 a week; and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of injury. In cases included by the following schedule, the disability in each such case shall be deemed to continue for the period specified and the compensation so paid for such injury shall be as specified therein, to-wit: * * * For the loss of an eye, fifty per centum of average weekly wages during one hundred weeks; the loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability to be compensated according to the provisions of Section 9."

Counsel, upon the oral argument and in the printed briefs stated that after diligent search they were unable to find a case in point. Since the case was submitted counsel for the claimants has called the attention of the court and opposing counsel to the case of State ex. rel. *Garwin* vs. *District Court,* et al., 151 N. W. R. 910, which is a case on all fours as to the facts. It is not a precedent in the instant case however, because the Minnesota Statute contains language not found in the Michigan Statute reading "if an employe receive an injury which of itself would only cause permanent partial disability, but which combined with a previous disability does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury," and it was held the compensation should be based upon the permanent partial disability, and not as claimed by the appellant on the basis of permanent total disability.

It must be confessed that the provisions of the Michigan Statute are so ambiguous as not to be free from doubt as is evidenced by the diverse constructions put upon it by the able

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counsel employed in the case before us. All of its provisions however should be given effect if possible.

The compensation fixed in Section 9 must be based upon the fact that the total incapacity for work resulted from the injury.

Section 10 deals with the partial incapacity for work resulting from the injury and fixes the compensation and then proceeds "for the loss of an eye fifty per centum" etc., * * * "the loss * * * of both eyes * * * shall constitute total and permanent disability."

In the instant case the loss of the first eye was a partial disability for which if our Workmen's Compensation Law had been in existence the then employer would have been liable, and for which disability the present employer was in no degree the cause. The loss of the second eye standing by itself was also a partial disability and of itself did not occasion the total disability. It required that in addition to the results of the disability occasioned by the accident of seven years ago, there should be added the results of the partial disability of the recent accident to produce the total disability. The absence of either accident would have left the claimant partially incapacitated. We think it clear the total incapacity cannot be entirely attributed to the last accident. It follows that the compensation should be based upon partial incapacity and it is so ordered.

The case will be remanded for further proceedings.

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SUPREME COURT.

A. HARRY GIGNAC,
Claimant and Appellee,

vs.

STUDEBAKER CORPORATION,
Contestant and Appellant.

WORKMEN'S COMPENSATION—WILFUL INTENTIONAL MISCONDUCT.

Claimant, a car checker, was injured while passing between cars to which an engine was attached. He placed his foot on a coupling and when the engine backed, his foot was caught and injured.

HELD: Claimant was not guilty of such wilful misconduct as would preclude his receiving compensation under the terms of the Workmen's Compensation Law.

Certiorari to the Industrial Accident Board, to review the order of the board in awarding compensation to A. Harry Gignac, while in the employ of the Studebaker Corporation. Affirmed.

F. J. Ward, of Detroit for defendant and appellant. No appearance for claimant.

BROOKE, C. J. The facts involved in this case may be briefly stated as follows: The claimant, a young man about 20 years of age, was employed by the defendant corporation as a checker. At the rear of the plant operated by appellant was a side-track of the railroad company, running along the side of the platform where empty cars were placed to be loaded with automobiles. It was claimant's duty to check each automobile as it was placed in the car. When the string of cars was loaded it was customary to remove it to another track a short distance away from the platform. On the evening before the accident claimant had checked a string of cars which stood beside the platform. Returning to his work the follow-

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ing morning, he found that those cars had been removed from the front of the platform to the other side-track. Desiring to assure himself that he had properly checked the automobiles in this particular string of cars, he crossed over to the track upon which they stood, and there made the necessary examination. Returning to the plant he found that in his absence another string of cars was being placed upon the track in front of the platform, the engine being still attached thereto. Without stopping to see where the trainmen were and without knowing but what they were signalling this train to back up or go ahead, he attempted to cross through between the watertank and the end car and in so doing he placed his right foot on a coupling. The engine came back and caught his foot, crushing it so that it was necessary to amputate his five toes.

Compensation for said injury was allowed by the arbitration board, which award was afterwards affirmed by the Industrial Accident Board. But one question is raised upon the record. It is the claim of the appellant that the claimant was guilty of intentional and wilful misconduct as a matter of law. Section 2 of part 2 of the Public Acts of Michigan, Extra Session, 1912, is as follows:

> "If the employe is injured by reason of his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act."

Appellant cites and relies upon the following cases: Johnson v. Marshall Sons & Co., 22 T. L. R. 565, 75 L. J. K. B. 868; Hill v. Grandy Consolidated Mines, 12 B. C. 118, 1 B. C. W. 436; Johnson v. Marshall Sons & Co., 94 L. T. 828; 8 W. C. C. 10; Leishman v. William Dixon, 47 Scotch L. R. 410, 3 B. W. C. C. 560; John v. Albion Coal Co., 4 W. C. C. 15; George v. Glasgow Coal Co., 78 L. J. K. B. 47, 25 T. L. R. 57. These cases all arose in foreign jurisdictions and under statutes containing somewhat different language from that used in the Michigan Act. The question has twice been presented to this court, in the case of Clem v. Chalmers Motor Co., 178 Mich.

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340, and again in the case of Rayner v. Sligh Furniture Co., 180 Mich. 168.

While it is quite clear that the claimant's injury was brought about by his own gross negligence, we are of opinion that it cannot be said as a matter of law that he was guilty of such intentional and wilful misconduct as would defeat his recovery. Our own adjudicated cases cited above are conclusive upon this point.

The judgment is affirmed.

GEORGE HIRSCHKORN,
Claimant and Appellee,
vs.
FIEGE DESK COMPANY,
and
MICHIGAN WORKMEN'S COMPENSATION MUTUAL INSURANCE COMPANY,
Respondents and Appellants.

1. MASTER AND SERVANT— WORKMEN'S COMPENSATION—PARTIAL LOSS OF EYE.

On ceritorari to an award of the Industrial Accident Board allowing thirty-five weeks' compensation for the partial loss of claimant's eye, the award could not be sustained under section 9, Act No. 10, Extra Session 1912, 2 How. Stat. (2d Ed.) § 3956, relating to total incapacity, nor under section 10 of the statute, unless its provisions for partial incapacity cover such injury, said section providing that the employer shall pay weekly compensation for partial incapacity to work.

2. SAME—PARTIAL INCAPACITY.

No support for an award for the partial loss of an eye can be found in the schedule of injuries found in said section 10; the provisions of the statute relate only to the loss of an eye and an award

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on the theory of future incapacity must be restricted to claimant's earning capacity in the employment in which he was injured at the time of the accident. Accordingly, a claimant who concedes that he could do his work as well after his injury as before and is receiving equal wages, could not obtain compensation under the Workmen's compensation law although it was found by the accident board that the usefulness of the injured eye was impaired to an extent of one-third of its vision.

Certiorari to the Industrial Accident Board. Submitted November 24, 1914. Decided January 29, 1915.

George Hirschkorn presented his claim to the Industrial Accident Board against the Fiege Desk Company for injuries sustained in its employ. From an order awarding compensation contestants, Fiege Desk Company and Michigan Workmen's Compensation Mutual Insurance Company, bring certiorari. Reversed and award vacated.

Person, Shields & Silsbee, for claimant.
Beaumont, Smith & Harris, for contestants.

BIRD, J. While the claimant was employed by the Fiege Desk Company at Saginaw, operating a certain machine, a piece of emery flew into his left eye and injured it. The emery was removed, but the eye became inflamed and iritis set in. He was totally incapacitated for work for nine weeks, and full compensation therefor was paid to him by respondents. When claimant returned to work, the inflammation and iritis had subsided and his recovery was complete, save for the fact that the injury left a scar in the center of the cornea, covering the pupil, which causes a blur and prevents him from seeing an object clearly. This condition reduced the vision of his eye nearly one-half, and is permanent, but it is not thought the vision will be further reduced as a result of the injury. Since claimant returned to his work, he has been doing the same work as before the injury, and is receiving the same wages. On this state of facts, the Board made a further allowance, and in so doing, said in part:

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"That, the usefulness of the left eye of applicant having been destroyed by said injury to the extent of more than one-third, and somewhat less than one-half, the applicant was entitled to an award of 35 weeks' compensation in addition to the amount theretofore paid, that being the fair and reasonable percentage of the 100 weeks' compensation which the law provides for the full loss of the eye."

This award is questioned by respondents, and it is argued that there is no authority in the law by which such an award can be justified. If the award is to stand, some authority in the law must be found to support it. It is obvious that it cannot be sustained under Act No. 10, part II, § 9, Pub. Acts, 1912 (Extra Session), because claimant is not wholly incapacitated. It must then be sustained, if at all, under section 10, providing for partial incapacity. Section 10 provides that:

"while the capacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employe, a weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter," etc.

There is then added to the section a schedule of specific injuries fixing the number of weeks for which compensation shall be paid. The partial loss of an eye does not appear in the schedule. It deals with nothing less than the loss of one eye. It is therefore clear that no support can be found for the award in the schedule. Under the general power conferred by Sec. 10 upon the Board, an award might be made for such an injury on the theory of a future incapacity in other employment, were they not restricted in determining the loss "to his earning capacity in the employment in which he was working at the time of the accident."

Section 11.

Inasmuch as claimant concedes that he can now do his work as well as before the injury, and that he is receiving the same wages therefor, we are unable to see that the Board had any authority under the general power granted by section 10 to award claimant any relief. The award made by the board was a very equitable one, and is one which we would prefer to sus-

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tain, if we could do so without attempting to amend the law by judicial construction. It appears to be, however, an exigency which the law has not provided for. We think the relief in such cases lies with the Legislature rather than with the courts.

The award must be reversed and set aside.

SUPREME COURT.

BLANCHE MILLER,
Claimant and Appellee,
vs.
RIVERSIDE STORAGE & CARTAGE COMPANY,
and
LONDON & LANCASHIRE GUARANTEE & ACCIDENT COMPANY,
Contestants and Appellants.

1. WORKMEN'S COMPENSATION ACT—DEPENDENCY—QUESTION OF FACT. Whether a person not conclusively presumed to be wholly dependent upon the deceased servant for support, but falling within the class which may be partially dependent, under the Workmen's Compensation Act, is dependent, is a question of fact to be determined as of the date of the accident to the employe.

2. WORKMEN'S COMPENSATION ACT—DEPENDENCY—EVIDENCE OF. In a proceeding under the Workmen's Compensation Act for recovery for the death of a servant, evidence *held* to warrant a finding that claimant, a sister of deceased, was partially dependent on him for support.

Certiorari to Industrial Accident Board.

Claim by Blanche Miller against the Riverside Storage &

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Cartage Company and the London & Lancashire Guarantee & Accident Corporation for compensation for the death of a servant. An award by the committee of arbitration being approved by the Industrial Accident Board, contestants bring certiorari. Affirmed.

Clark, Lockwood, Bryant & Klien, of Detroit, for claimant.
Florian, Moore & Wilson, of Detroit, for defendants.

OSTRANDER, J. Thomas Miller was employed by the Riverside Storage & Cartage Company, at a wage of $15.50 per week. He died from an injury found to have been sustained by him in the course of and growing out of his employment, the injury being received September 2, 1914. Claimant is his sister. Whether she was dependent upon him, within the meaning of the statute, is the question presented, it being claimed there was no evidence of dependency. The award of the committee of arbitration was approved by the Industrial Accident Board. The award was:

"That the said applicant, Blanche Miller, is entitled to receive and recover from said respondents, Riverside Storage & Cartage Company, and London & Lancashire Guarantee & Accident Company the sum of Three (3) dollars per week for a period of three hundred (300) weeks, from the 2nd day of September, 1914, and that said applicant is entitled to receive and recover from said respondents on this date thirty-three dollars, being the amount of such compensation that has already become due under the provisions of law, the remainder of said award to be paid to said Blanche Miller, applicant, by said respondent in weekly payments, commencing one week from the date of the award."

Whether one is or is not dependent upon another for support is, of course, a fact. By the terms of the act persons standing in certain relations to a deceased employe are conclusively presumed to be wholly dependent upon him for support. Claimant is not one of them, nor were there any such dependents of the deceased employe. She is, however, a person who may be a dependent. It is provided that if the employe leaves dependents only partly dependent upon his earn-

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ings for support at the time of his injury, the weekly compensation to be paid (by the employer) shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employe to such partial dependent bears to the annual earnings of the deceased at the time of his injury. Questions as to who constitute dependents and the extent of their dependency are to be determined as of the date of the accident to the employe and their right to any death benefit becomes fixed as of such time, irrespective of any subsequent change of conditions.

Testimony for the claimant, who is 22 years old, tended to prove that from the time he was 16 or 17 years old her deceased brother, who was seven years her senior, had contributed to her support. Claimant went to Detroit when she was eighteen years of age, and, with her brother's aid, educated herself to be a stenographer. She was employed by one concern some two and one-half years, first at eight dollars a week, then at ten dollars, and for some time before her brother was injured at twelve dollars a week. She lost some time, but was paid her full salary. She quit work in August, 1914, going on a visit to her old home in Colorado, and was in Colorado when her brother was injured. She testifies that her brother, regularly, gave her six dollars a week until she left Detroit. He then gave her seventy-five dollars for her journey. From February 8, 1913, to August 17, 1914, claimant had on deposit in a savings bank seventy dollars. She took music lessons "off and on," while in Detroit, and, not being strong, physically, paid out considerable money—the last in May, 1914—for medical attention. At the hearing in December, 1914, she was employed at ten dollars a week. She went to Colorado, she says, for rest, being nervous and not doing her work well. The deceased brother received as much as eighteen dollars a week, at one time, at one place where he worked in Detroit. He received, occasionally, tips, or extras, she says, while employed by the respondent. Claimant paid for room and breakfast and dinner five dollars a week, for lunches twenty-five cents each, for car fare seventy-five cents a week.

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She purchased clothing during the period from September, 1913, to September, 1914, $112.25. She made a visit to Pennsylvania during the time she lived in Detroit. She did no work while upon her last visit to Colorado, and paid nothing for board or room. She received nothing during that period from her brother. The arrangement they had made was that he was to go to Colorado and return to Detroit with her.

Upon cross-examination, she computed her expenses for the year ending in September, 1914, including room, food, clothing and street car fare, at $489.25. And counsel say that, being in a position to earn, and earning, when at work, a sum equal to $520, or more, annually, she was not, upon her own computation and statement, dependent upon any one—she was independent.

It is probable that in every case where a brother or sister of a deceased employe claims relief under the statute, the evidence of dependency will necessarily be evidence of contributions made by the deceased, because in such cases the support furnished by either to the other, or the service rendered by either to the other, will be voluntary. But voluntary contributions of money, support, or service, by a brother to a sister, or by a sister to a brother, are not, necessarily, evidence of the dependency of either, or of the extent of dependency, within the purview of the statute. The Legislature has not defined "dependent"; it is probable that no standard for the determination of dependency in fact can be formulated. In a case in which a father sought compensation on account of the death of a son who had contributed to his father a certain average sum weekly, it was said the question is whether the father:

> "Made a loss by the death of his son, in consequence of there no longer being a source of assistance to him from his son's earnings, in the work at which he was killed, and on which source, from his own inability to earn wages himself, he was wholly or partially dependent." *Arrol & Co., Ltd.* v. *Kelly*, 7 F. 906, 42 S. C. L. 695.

In *Simmons* v. *White Bros.*, 80 L. T. 344, 1 W. C. C., 89, and

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in *The Main Colliery Co., Ltd.* v. *Davies,* 2 W. C. C. 108, one or more of the judges were of opinion that:

"Dependent probably means dependent for the ordinary necessaries of life for a person of that class and position in life."

So in *Howells* v. *Vivian and Sons,* 85 L. T. 529, 4 W. C. C. 106, it was said:

"The test of dependency is not whether the family could support life without the contributions of the deceased, but whether they depended upon them as part of that income or means of living."

These expressions, called out by the facts of particular cases, do not supply a rule. As cases arise, in some of which the facts are held not to prove, and in others to be consistent with, dependency, debatable ground will be narrowed. Unless a standard of independence for unmarried women who work for and live upon wages can be set up which classes as independent all who earn ten or even twelve dollars a week, or more, it cannot be said there was no testimony tending to prove the dependency of claimant. It is manifest there are many women who regard themselves as independent, who live wholly upon their wages, who receive a smaller weekly wage. According to the report of the commissioner of labor, published in 1915, there were employed in Detroit 1,974 female stenographers who receive wages, the average daily wage being $2.22. In two cities only, out of sixty in the State, reported, is there paid a higher average daily wage. Assuming six days a week's work, the average wage per week was $13.32. This is more than claimant ever received, and more than three dollars per week more than she was earning when her deposition in this case was taken. That she can maintain herself upon the wages she is getting is probably true, at least with good, or fair health. She says she has not good health, and an agent of her former employer testified that she is nervous and excitable.

Upon all of the testimony, the arbitration committee and the Industrial Accident Board held that she was partly depend-

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ent upon her deceased brother. I do not think it clear that the finding is wholly unsupported by testimony. It follows that it should be and is affirmed.

SUPREME COURT.

CLARENCE L. CLINE,
Applicant and Appellee,
vs.
THE STUDEBAKER CORPORATION
and
ROYAL INDEMNITY COMPANY,
Respondents and Appellants.

1. INJURY IN COURSE OF EMPLOYMENT.
In a proceeding before the Industrial Accident Board for compensation under the Workmen's Compensation Act, evidence *held* sufficient to warrant the board in finding that the gonorrheal infection which partially destroyed the sight of the injured eye resulted from an accident in the course of employment.

2. COMPENSATION FOR PARTIAL LOSS OF EYE.
Where a servant suffered only partial loss of his eye, which did not impair his ability to work, and resulted in no reduction of wages, he was not entitled to compensation for "loss of an eye" under the Workmen's Compensation Act, §10, but only for the partial loss, as measured by lessened earnings.

3. TOTAL "LOSS OF EYE."
Where, after an injury to a servant's eye, he had 10 per cent of normal vision without glasses, and 50 per cent with them, it could not be said that the injury resulted in total loss of the eye, since he could not rest on the 90 per cent diminution of sight; it being his duty to minimize the injury by the use of such a common appliance as glasses.

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Certiorari to Industrial Accident Board.

Proceedings under the Workmen's Compensation Act by Clarence L. Cline to obtain compensation for personal injuries, opposed by the Studebaker Corporation, the employer, and the Royal Indemnity Company, the insurer. Reversed and set aside.

William D. Ellsworth, of Detroit, for claimant.
Frederick J. Ward, of Detroit, for defendants.

PERSON, J. It is claimed in this case that the appellee was injured while working for the defendant manufacturing company, and that the result of such injury was the loss of his right eye. The insurance company carrying the risk, and the injured employee, entered into an agreement, about a month later, regarding compensation, of which the material part reads as follows:

"On the 2nd day of March, 1913, about five o'clock in the morning the injured was working on a rear axle with another employee—a piece of steel flew and struck injured in the eye. A gonorrheal infection set in and the injured was obliged to quit work on the morning of March 4th, 1913.

"The terms of the agreement follow: It is mutually agreed by and between the parties hereto that the average weekly wage of the injured at the time of the accident was $15 per week and that the injured is to receive as compensation herein the sum of $7.50 per week as provided for by the Michigan Compensation Act."

This agreement was approved by the Industrial Accident Board, whereupon the insurance company paid to the appellee $66.25, and received his receipt as for a full settlement of compensation, subject, however, to the approval of the Board. Subsequently, and on the 25th day of October, 1913, the appellee applied for further compensation, and a committee of arbitration was appointed, which decided that he was entitled to the sum of $7.50 per week for 100 weeks from date of the accident. The committee also found that there was due to the appellee, at the time of their report, the sum of $321.50 less the $66 already paid. Upon appeal to the Industrial Ac-

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cident Board this decision of the committee of arbitration was affirmed, the Board returning the following findings of fact:

"The infection which destroyed the sight of the eye is not reasonably accounted for except as coming through or resulting from the accident, the applicant himself being free from the disease. The infection may have come from the hands of Mr. Rood, when he tried to roll the eyelid back with a match, or from the hands of the night-watchman when he took a piece of steel from the eye. The eye was normal before the injury and the inflammation which directly followed the injury caused the damage to the eye."

The objections to the award, argued in this court, will be considered in their order.

1. That the loss of sight should not be attributed to the accident, but to a disease not in any way connected with the employment.

The fact that a piece of steel flew into the claimant's eye in the course of his employment seems fairly well established. His testimony is to that effect and it is corroborated by his fellow workmen. But it is not shown that this flake of steel directly caused the subsequent impairment of vision; that, on the contrary, must be attributed to the gonorrheal infection. Such is the finding of the Board, and the finding is in accordance with the agreement between the parties. Nor is it probable, from the testimony of the doctors, that the germ which caused the infection was upon the steel itself; they state, however, that such a germ might get into the eye from a towel, from washing utensils, from the straps or rails of a street car, and in similar ways.

The burden is therefore, as insisted by counsel for defendants, upon the claimant to show by a preponderance of evidence that the infection arose out of and in the course of his employment, instead of at some other time and in some other way. In short, under the circumstances it was for claimant to show that the infection was connected with the accidental entry of the steel into his eye. And in this behalf counsel cite *McCoy* v. *Michigan Screw Company*, 180 Mich. 454, where

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the relation between the infection and the employment, was held not to have been established. In instances like the present, however, where the claimant himself is personally free from the disease, it is hardly possible that the source of infection can be shown absolutely by direct evidence. Nor is that necessary. "By a preponderance of evidence is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests." *Hoffman* v. *Loud,* 111 Mich. 156.

As has been said, the claimant was himself personally free from the disease up to the time of the accident. Such was the testimony of the doctor who attended him, and the Industrial Accident Board has found it to be a fact. Nor does counsel for defendants dispute the correctness of the finding. The gonorrheal germ must have come from some outside source. It must also have been received not later than the time of the accident to have developed into the condition found by the doctor two days afterwards, according to his testimony. These conditions, in connection with the fact, as shown, that an injured eye is more susceptible to the infection than a normal eye, and with the further fact, that at once, after the accident, a fellow workman examined the eye, using for the purpose a match wrapped in a piece of cloth create a considerable degree of probability that the germ got into the eye in the attempt to remove the steel. And this probability was sufficient to warrant the Board in their finding that "the infection, which destroyed the sight of the eye, is not reasonably accounted for except as coming through or resulting from the accident." *Sullivan* vs. *Modern Brotherhood,* 167 Mich. 524. If the germ was introduced in an attempt to remove the flake of steel from the eye, it was a direct consequence of the accident, and arose out of and in the course of the employment. The attempt to remove the particle of steel was a natural and necessary result of its entry into the eye. In fact, the proofs in this case seem to fairly establish the element that was lacking in the McCoy case.

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2. That the Industrial Accident Board acted without authority of law in allowing claimant $7.50 per week, for the period of 100 weeks, even if the infection is found to have arisen out of and in the course of his employment.

The claimant was wholly incapacitated during a period of about nine weeks, and for that he was paid $66.25 according to his receipt hereinbefore mentioned. He then resumed his work for the same company, in about the same line of employment, and at substantially the same wages he was receiving before the injury. He does not testify to any impairment of his ability to work, nor to any reduction in wages, because of the loss of eye sight; and it was determined by this court in *Hirschkorn* v. *Fiege Desk Company,* (150 N. W. Rep. 851), that the statute does not award compensation for the partial loss of an eye except as measured by lessened earnings. Although there is no special finding upon the point, it is evident from the amount allowed, that the Industrial Accident Board treated the injury as "the loss of an eye" rather than as a partial loss, and that it made its allowance under the schedule of fixed liabilities contained in Section 10 of the Act. Unless, therefore, the award can be sustained on that theory, it must be held to have been unwarranted.

The eye was examined for loss of sight by two experts, who made their tests separately, and in different ways. One aimed to discover how much the claimant could see when using proper glasses, and found that with their assistance he had one half of his normal vision. The other made his test without glasses and says that the eye, unaided by artificial means, has lost 90% of its sight. Neither attempted the others test, so that the testimony of each stands unquestioned, and without impeachment by anything in the record. The net result is that, when using proper glasses, the claimant has 50% of his sight, while without them he has only 10%. The evidence will not permit of any different conclusion.

Under these circumstances it seems impossible to say that the injury has resulted in the loss of the eye. The use of glasses is a very ordinary occurrence, both by young and the

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old. It is unnecessary to determine whether the loss of 90% of the sight is substantially the loss of the eye, because that is not the present case. Ninety per cent of the sight is not lost when it can be diminished to 50% by the use of common appliances. And it is the duty of the sufferer to minimize the injury as much as he reasonably may. We cannot help but feel it unfortunate, however, that further tests of the eye were not made so as to exclude all possible chance of mistake in so important a matter.

The case of *Hirschkorn* v. *Fiege Desk Company, supra,* must must be held as controlling in this one. The statute seems not to have provided compensation for the partial loss of an eye under the circumstances existing here. That case, however, had not been determined when this matter was before the Industrial Accident Board.

The award must be reversed and set aside.

SUPREME COURT.

LIZZIE G. DEEM,
Claimant and Appellee,
vs.
KALAMAZOO PAPER COMPANY,
Defendant and Appellant.

EVIDENCE—PROXIMATE CAUSE OF DEATH.

The evidence shows claimant's decedent—her husband—fell in defendant's plant and was injured; that he returned to work a few days later, but was still suffering from his injuries; a short time after returning to work he fell dead in the plant; medical testimony tended to show that there was a concussion of the brain resulting from the original injury.

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HELD: That the proof was sufficient to support the award of the Board in favor of the widow for 300 weeks' compensation.

Certiorari to the Industrial Accident Board to review the action of that board in awarding compensation to Lizzie Deem for the death of her husband, while in the employ of defendant, Kalamazoo Paper Company. Affirmed.

Charles H. Farrell, of Kalamazoo, for claimant.
Alfred J. Mills, of Kalamazoo, for defendant and appellant.

BIRD, J. William W. Deem, husband of claimant, had been employed by the Kalamazoo Paper Company for nearly 20 years prior to his death. During that time he had been in reasonably good health, and had lost very little time. For several years prior to his death he had acted in the capacity of "beater" engineer. On the morning of June 29, 1914, he was engaged in renewing the screen on one of the "beater" cylinders. To accomplish this he stood on a plank placed across the top of the "beater" tub. The plank extended about 18 inches beyond the edge of the tub. During the temporary absence of his helper he slipped or made a misstep on the wet plank and fell to the cement floor, striking on his head and right shoulder. He was picked up in an unconscious condition by the superintendent, but he regained consciousness soon after and complained of being dizzy and of a pain in his right shoulder. His face was red and he tried to vomit. Later he was assisted to a street car which carried him to his home. The family physician was called and found him with a badly bruised head and shoulder. These were cared for by the doctor, and his recovery was rapid enough so that on July 6th he returned to his work and continued to work until his death. On the morning of July 16th, he was seen to fall through the doorway leading from the "beater" room into the engine room. The engineer saw him, and went at once to his assistance, but found upon reaching him that he was dead.

A claim for compensation was filed with the Industrial Ac-

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cident Board by his widow, alleging that deceased came to his death as a result of injures received in a fall on June 29th. The matter received the attention of the board of arbitration and she was given the statutory allowance of $3,000. An appeal to and re-argument before the Industrial Accident Board resulted in an affirmance of the award. The claimant contended before the arbitration board that the deceased came to his death on July 16th as a result of concussion of the brain caused by his fall on June 29th. The claim was contested on the ground that death was caused by heart disease which had no connection with his injury, and further, that the proofs left it to conjecture as to the cause of death.

It is obvious that the injury arose out of and in the course of deceased's employment and if his death was traceable to this injury, the award should be affirmed. To establish the fact that it was so traceable, claimant offered the testimony of Dr. Henwood, the family physician, who testified in part as follows:

"His death would be possible as the result of the blow he received on the 29th of June. From what I know of his condition, his physical condition on that morning when I examined him, I don't think there was anything else, as far as I know, that would probably cause that at that time. There was no organic trouble of any kind to my knowledge. Assuming there may have been it would be possible for it to have been accelerated by that injury, and death may have been hastened as a result of that injury."

He also testified that as a result of his examination and treatment it was his opinion that it was probable he died from the results of the blow, and that a period of two weeks was not an unusual time in which a concussion of the brain might produce its results.

Dr. Paul Butler in answer to the hypothetical question as to the cause of death, answered that:

"Assuming for the purpose of this case, that the facts are that he suffered from sleeplessness, loss of appetite, dizzy spells, I would say that he was suffering from concussion of the brain due to the original blow or injury of June 29th, or due to an injury anyway."

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And later this witness gave it as his opinion that death resulted from concussion caused by the injury. Dr. Rush McNair, a witness for the respondent, admitted that from the description given by Dr. Henwood he "would judge there was some concussion."

As opposed to this there was testimony which tended to show that the deceased had been troubled about three years prior to his death with a cardiac disturbance, and testimony was offered and received from which an inference might have been drawn that the deceased came to death from that cause. The testimony of claimant, however, brought the question as to the cause of death into the domain of fact, and as the Industrial Accident Board has passed upon the question of fact, and found that her claim was established, there is nothing left for us to do but to affirm the award.

SUPREME COURT.

ALMA FINN,
Claimant and Appellee,
vs.
DETROIT, MT. CLEMENS & MARINE CITY RAILWAY,
Defendant and Appellant.

HUSBAND AND WIFE—LIVING WITH AT TIME OF INJURY—WHAT CONSTITUTES.

A wife who is living apart from her husband, following a vocation in another state, which was her means of livelihood prior to her marriage, cannot be said to be wholly dependent upon him for her support, within the meaning of the Workmen's Compensa-

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tion Law, and on his death entitled to maximum compensation from his employer.

Certiorari to the Industrial Accident Board to review the action of the board in allowing an award in favor of Alma Finn against the Detroit, Mt. Clemens and Marine City Railway, as compensation for the death of her husband, William Edward Finn, while employed by defendant. Reversed.

Eldredge & Kelly, of Mt. Clemens, for claimant.

Corliss, Leete & Moody, and *Benjamin S. Pagel*, of Detroit, for defendant and appellant.

STEERE, J. This proceeding involves the review of a decision of the State Industrial Accident Board in affirming the conclusions of an arbitration committee awarding to complainant full compensation for the death of her husband under the provisions of Act No. 10 Pub. Acts 1912, extra session.

On May 9, 1914, William Finn, claimant's husband, while employed by respondent as an assistant engineer in its power house at New Baltimore, Michigan, sustained fatal injuries by a boiler explosion, as a result of which he died two days later in a hospital at Mt. Clemens, Michigan. Claimant was not living with him at the time of the accident but, having been summoned by an agent of respondent, was with him in the hospital for an hour or two on the evening prior to his death.

These parties were married on October 31, 1912, and thereafter lived together as husband and wife in a home provided by the husband at New Baltimore until October 5, 1913, when claimant left her husband's home and went to Fort Wayne, Indiana, where she was engaged in teaching school, having been absent from him about seven months. She was there living and thus engaged when informed of her husband's injury. After his death she returned and resumed her work as a teacher, being yet so engaged at the time of the arbitration in this case.

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So far as the record before us discloses, neither the Committee of Arbitration nor the Industrial Accident Board made any finding of facts in this case, except such as may be indirectly inferred from the formal award to claimant, of $3,000 payable in weekly installments of $10 each, made by the Committee and a short order by the board affirming the same, which are set out in the return to the writ of certiorari. The only testimony returned is that of claimant, certified as a "true transcript of so much of the testimony taken in the said cause before the original Committee of Arbitration and presented to us upon the hearing of the cause before this board as is deemed material to said cause, and as agreed upon by the attorneys for the claimant and respondent respectively."

The material provisions of our workmen's compensation law (said Act 10 part 2 secs. 6 and 7) are as follows:

"Sec. 6. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employe: (a) A wife upon a husband with whom she lives at the time of his death; (b) A husband upon a wife with whom he lives at the time of her death; (c) A child or children, etc., * * *. In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury; and in such other cases, if there is more than one person wholly dependent, the death benefit shall be divided equally among them, and persons partly dependent, if any, shall receive no part thereof; if there is no one wholly dependent and more than one person partly dependent, the death benefit shall be divided among them according to the relative extent of their dependency. * * *

"Sec. 7. Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the accident to the employe, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent change in conditions; * * *."

To arrive at the award made by the committee and affirmed by the board, they apparently found that claimant was living with her husband at the time of his death, and they must, therefore, conclusively presume that she as his wife was wholly dependent upon him for support regardless of what the actual facts were, and without regard to the later provisions of the

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act as to questions of dependency in whole or in part in other cases, or the requirement that the extent of dependency and right to death benefit shall be determined and fixed as of the date of the accident.

Whatever legal fiction may be invoked under a presumption as to claimant's residence by reason of coverture, it is undisputed that during more than half a year preceding her husband's injury and death she was living in another state where she had resumed the manner of life and vocation followed by her before marrying, having of her own volition left her husband, abandoned the home in which they were living together and withdrawn from all domestic duties and obligations of a wife under such circumstances as, from her standpoint, demanded a reconciliation with her husband before she would again live with him and resume marital relations.

It is urged in her behalf that her evidence shows her absence from her husband was but temporary, with his consent and not a final separation; that they were yet husband and wife, in friendly communication with each other, he contributing to her support and, under a cited line of authority bearing on the temporary absence of husband and wife from each other for some good reason, she was living with him in contemplation of law at the time of his injury, and in fact at the time of his death.

Her evidence as to the nature and occasion of leaving her husband and living apart discloses something more than a mere suspension of the family relations, for an understood period of time, incidental to journeys for business or pleasure, changing the family place of residence, delays in preparing a new home, financial embarrassment, sickness or like common causes which often result in the members of a family temporarily living apart without estrangement. While claimant testifies at length as to how she came to leave, what she thought and how she felt about it, much of her evidence consists of conclusions and generalizations. She states they were of different religious faith, and had different ideas of different

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things, that there was no climax, that when she went she did not regard it as a final separation, and there was no agreement to that effect. She makes no claim that her husband wanted her to go or was unkind to her, but that matters were discussed and he "felt that if I was not happy and wanted to go, why I could go, but that I should feel free to send to him for money at any time, and that he was always perfectly willing to give me whatever I wanted at all times;" that they made no definite arrangements for her to come back and live with him, but she "was perfectly willing to come, and willing for a reconciliation—in fact had looked forward to it all the time, and felt it was bound to come." On whose initiative it was to come and just what was to be reconciled she does not state. Asked what were her intentions when she went away and her feelings towards her husband she answered in part:

"My intentions were just—I really intended to go home and I felt just going away and staying a while to see if the separation would not bring back a reconciliation. It was not a final move on my part. * * * I cared a great deal about him—I had no great ill-feeling, no ill-feeling towards him at all. It was just simply that there were a lot of little things came up, different things and different opinions, and so forth, that made us unhappy, and under the circumstances I thought that going away would bring us together."

The latter Hibernicism embodies the substance of her repeated explanations of why she left and stayed away from her husband. In another portion of her testimony she says: "I felt we were drifting apart and the only thing that would bring us together would be a separation. So I went away." In other words, she felt that "they would look better to each other when out of sight." She further testifies that after leaving her husband they corresponded and she received letters from him every two or three weeks, all of which she destroyed when changing her boarding place in April, because she did not care to take them with her, that he sent her money whenever she requested it and since she left had sent her a total of $78.

From the time claimant left her husband's home, in October, 1913, she did not see him again until the night of May 10,

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1914, when she arrived at the hospital in Mt. Clemens about midnight and sat at his bedside an "hour or two," during which time she states that she "talked very little to him, once in a while I spoke to him and he knew me, recognized me, spoke my name and once sang. I asked him not to sing, and he tried to rise and he said, 'I always sang to you, and I think I can sing now.'" After she had been with him the length of time stated she went to another room at the suggestion of one of the sisters and did not see him again before his death, which occurred the next morning at 8 or 9 o'clock. She testified that when she went in and spoke to him he first asked how she could leave her school? That when she inquired if he missed her and had been lonesome without her, he said he had been "so lonesome. * * You won't leave me any more, will you? You will stay right here with me always."

It is urged that claimant's testimony sustains the statutory conclusive presumption of dependence in whole, because she is shown to have been living with her husband at the time of his death, it being said in her counsel's brief: "If ever husband and wife were living together, these two were when they met, because reconciled and spent their last few hours as husband and wife together."

While deceased's feeling and attitude as to a "reconcilation" may be inferred from his statement that he had been lonesome in her absence and his request that she "stay right here" with him "always," it does not even appear she gave him any assurance that she acquiesced, or that anything further passed between them concerning her return beyond his inquiry as to how she could leave her school to which she responded she had "managed that all right."

Can it be said from her testimony, viewed most favorable to such contention, that within the purpose and meaning of the statute, she was a wife living with her husband at the time of his death? She had just arrived from another state where she was located and regularly employed as a teacher coming, as she states, on receipt of "a telegram from the claim agent, Mr. Le Fevre, of the D. U. R. stating that my husband was

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badly burned and for me to come to Mt. Clemens, to St. Joseph Sanitarium." She was with him in his room, in the hospital to which others had taken him, for an hour or two after her arrival, and remained in the same building but not with him until his death on the following day. Leaving out of consideration the fact that they had been married and were not divorced, they were no more living in family relation, as such relation is commonly understood, than would have been any friend or relative who learned of his injury and visited him at the hospital under like circumstances for the same length of time. After she first withdrew from all conjugal relations, leaving her husband and their home of her own accord, they had no matrimonial abode, house or home life together during the remainder of his life and, so far as shown, no definite agreement that they ever would have. Conceding the claimed reconciliation, which was with her a condition of resuming the marital relations, they never did, or could, reestablish a home and actually dwell together in fact.

The purpose and scope of this statute is compensation to dependents when death or injury befalls the workman. It touches no other property rights arising out of the domestic relations. Dependency, in whole or in part, is primarily and as a rule a question of fact to be determined as evidence may disclose, with the exception of an absolute presumption of dependency (irrespective of the facts) in case of husband and wife or minor children under specified conditions. No distinction is made between husband and wife in that particular. If a wife living with her husband is fatally injured in an employment coming under the act, the husband living with her at the time of her death is likewise conclusively presumed to be wholly dependent for support upon her, irrespective of what the real facts are. If the parties in this case were reversed and it was the husband demanding in his favor conclusive presumption that he was wholly dependent upon his wife because living with her at the time of her death, he would be equally entitled to it under the statute, but that he was living with her must be established before the presumption can

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be invoked. In this case the nature and character of claimant's absence from her home and husband are undisputed and, whatever reason, preference or pretext she may have had for such course, it is manifest that she intended to and did sever the personal marital relations for an indefinite period with the possibility and the expectation, as she represents, that at some indefinite time in the future, after a reconciliation, they would be resumed. In the most favorable view, as she states the case, the husband and wife were voluntarily living apart because they were not happy together, in different states, each following the pursuits and living the separate life led before marriage, but in friendly correspondence with each other and a possibility that the existing estrangement, whatever it was, might some time be reconciled and they live together again.

The Massachusetts Workmen's Compensation Act (St. 1911, c. 751, part 2 sec. 7), contains provisions identical with those under consideration here. In construing the expression "with whom she lives" the Supreme Court of that state, in re Nelson, 105 N. E. 357, holds that those words are "used in antithesis to living apart" and mean "living together as husband and wife in the ordinary acceptation and significance of these words in common understanding. They mean maintaining a home and living together in the same household or actually cohabiting under conditions which would be regarded as constituting a family relation. There may be temporary absences and incidental interruptions arising out of changes in the house or town of residence, or out of travel for business or pleasure. But there must be a home and a life in it. * * * But it is the situation arising from the circumstances of a common home, a place of marital association and mutual comfort, broken up or put in peril of hardship or extinction by the husband's death, which is protected by the conclusive presumption of dependency established beyond the peradventure of dispute by the statute." No such state of facts is disclosed here.

In those cases where absence of the husband, by reason of employment or other common causes regarded as temporary,

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from an established home in which he resided with his wife or family has been held not to negative the statutory presumption, it is nevertheless recognized that the family relations in intent and fact must otherwise exist unbroken. Even in the extreme case of *Northwestern Iron Co.* vs. *Industrial Accident Board,* 154 Wis. 97, cited and relied upon in claimant's brief—with which the Nelson case does not harmonize in all particulars—the rule is guarded and it is made plain that a wife may not be construed as living with an absent husband where there is an actual separation in the nature of an estrangement at the time of his injury and there exists at that time an actual severance or break in the marital relations. In this case it is the wife who had voluntarily absented herself from her home and husband under just the conditions last above recited and, therefore, the conclusive presumption of total dependence does not obtain.

The foregoing conclusions do not deprive claimant of the right to show actual dependence, total or in part, as a matter of fact. While there is in this record no proof nor conclusive presumption shown to sustain an award on the theory that she was wholly dependent for support upon deceased, either at the time of his injury or of his death, the board can and should review whatever evidence is produced, ascertain from it, and determine as the facts appear, the extent of her dependence upon deceased for support at the time of his injury, as in such cases provided.

The decision of said Industrial Accident Board is therefore reversed and the case hereby remanded for such further hearing therein before said board as parties may desire.

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SUPREME COURT.

GERTRUDE L. BLYNN,
Claimant and Appellee,
vs.
CITY OF PONTIAC,
Respondent and Appellant.

MUNICIPAL CORPORATIONS—MASTER AND SERVANT—POLICEMAN—DISTINCTION BETWEEN SERVANT AND PUBLIC OFFICER—PONTIAC CHARTER.

Under the charter of the city of Pontiac, which provides for the appointment of policemen by the city commission and that the police department should consist "of a chief of police and as many subordinate officers, policemen, and employees as the commission shall by ordinance determine," and also providing that the commission shall make the necessary rules to regulate the police department and the duties "of officers and employees of such department," policemen who took oath of office under the charter were not employees of the corporation, but were public officers not entitled to compensation under the workmen's compensation law. Act No. 10, Extra Session 1912 (2 How. Stat. [2d Ed.] §3945).

Certiorari to the Industrial Accident Board. Submitted January 12, 1915. Decided March 18, 1915.

Gertrude L. Blynn presented her petition against the city of Pontiac for compensation for the death of her husband. From an order awarding compensation, defendant brings certiorari. Reversed.

Aaron Perry, for appellant.
A. L. Moore, for appellee.

This is an appeal from a decision of the Industrial Accident Board, affirming an award made to the applicant by an arbitration committee on account of the death of Millard F. Blynn, her husband, who was killed on the 2d of January, 1912, while riding in an automobile with two other policemen;

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the automobile colliding with a telegraph pole. The facts stipulated by counsel are as follows:

(1). By virtue of the provisions of the Constitution of the State of Michigan, and Act No. 279, Pub. Acts 1909, the city of Pontiac, Mich., adopted in 1911 a charter providing for a commission form of government, and has been operating under such charter since that time.

(2). Section 1 of chapter 5 of said charter, among other things, provides that "all powers conferred on the city shall, unless otherwise provided in this charter, be exercised by a mayor and two commissioners, who together shall be known and designated as the "Commission."

(3). Section 1 of chapter 6 of said charter provides that "the executive and administrative powers and authority of the city not herein otherwise provided for shall be distributed among six departments as follows:

(1) Department of public safety.
(2) Department of finance.
(3) Department of water supply.
(4) Department of public utilities.
(5) Department of streets and public improvements.
(6) Department of sewers and drainage.

(4). Section 2 of said chapter provides that "the mayor shall be the commissioner of the departments of finance and public safety."

(5.) Section 1 of chapter 7 provides that "the commission shall determine and assign the duties of the several departments, except as in this charter otherwise provided."

(6). Section 5 of said chapter reads as follows: "All appointive officers of the city shall perform such duties as shall be prescribed by ordinance and this charter and which may be required by the commission and their heads of departments."

(7). Section 2, chapter 7, of the charter provides, among other things: "The mayor shall also have special supervision of, and be charged with, the proper administration of the police, fire, and health departments."

(8). Other sections in the charter give to the two other commissioners definite departments of work, such as sewers, drains, streets, etc., under one heading to one, and water supply and public utilities to another.

(9). Section 10, chapter 7, provides: "Each member of the commission shall have authority to employ such employes as may be necessary to conduct their several departments in an efficient manner, and such employes may be discharged at the pleasure of the member making such appointment."

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(10). Section 8, chapter 7, provides: "The mayor may, and shall, at the request of the commission, appoint a city attorney, chief of fire department, chief of police, and health officer, subject to the confirmation of the commission. All of such appointees shall be removable at the pleasure of the commission."

(11). Section 14 of said chapter provides: "that the commission shall by ordinance define the powers and duties of all city officers, whether elected or appointed, where the same have not been defined by this charter. Additional duties may be imposed on such officers whose duties are partially defined hereunder."

(12). Section 24 of said chapter reads as follows: "Every appointive officer shall, before he enters upon the duties of his office, subscribe and file with the city clerk an oath to suppoprt the Constitution of the United States and the Constitution of the State of Michigan, and to faithfully perform the duties of the office to the best of his ability."

(13). Section 15 of chapter 8 of said charter reads as follows: "Prosecutions for violation of the ordinances of the city may be commenced by warrant, and all process in such cases shall be in the name of 'The People of the State of Michigan.' The practice in such cases shall be the same, as near as may be, as in criminal cases cognizant by Justices of the Peace under the general laws of the State."

(14). Section 16 of said chapter reads as follows: "All process issued in any prosecution or proceeding for the violation of any ordinance shall be directed to the Chief of Police or to any police officer of the city or county of Oakland, and may be executed in any part of the State by said officer or any other officer authorized by law to serve process issued by a justice of the peace."

(15). Sections 4, 5 and 6 of chapter 10 of said charter read as follows:

"Sec. 4. The commission shall by ordinance establish and provide for the maintenance of a police department and a fire department.

"Sec. 5. The police department shall consist of the chief of police and as many subordinate officers, policemen, and employes as the council shall by ordinance determine.

"Sec. 6. The commission shall by ordinance make and establish rules for the regulation and government of the police department, prescribe and define the powers and duties of the officers and employees of such department, and shall prescribe and enforce such police regulations as will most effectually preserve the peace and good order of the city, preserve the inhabitants from personal violence, and protect public and private property from destruction by fire and unlawful depredation."

(16). Since the adoption of this form of government by the City of Pontiac, it has been the practice of the mayor to appoint police-

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men, and such as have been discharged have been discharged by the mayor without any action on the part of the commission as a whole in any way whatsoever. Policemen are not appointed for any definite term; no vote of the commission has been required to approve their appointment.

(17). No printed rules or regulations were ever adopted by the police department, and none were in force at the time of the appointment and death of Millard Blynn. No printed rules had been issued prescribing the beat limits or the portions of the city that the various policemen were required to control. Policemen were not required to make written reports of their doings or their whereabouts at any time other than to make returns of service of process when served by them. They were required to call up the central office at stated intervals by 'phone and report their whereabouts and what, if anything, unusual had occurred.

(18). April 29, 1911, the commission of said city made and passed an ordinance entitled, "An ordinance fixing and determining the compensation of the appointive officers of the City of Pontiac, prescribing their duties where not prescribed by charter, and repealing all ordinances and parts of ordinances conflicting herewith." That ordinance took effect at the expiration of 30 days from its passage, and sections 1, 2, 3 and 4 thereof read as follows:

"Sec. 1. The appointive officers of the City of Pontiac hereinafter named shall be entitled to and shall receive from the said City of Pontiac, in full payment for all services to be performed by such officers and employees, except as herein otherwise provided, the several amounts hereinafter designated and named.

"Sec. 2. The chief of police shall be entitled to and shall receive the sums of one thousand dollars per annum, payable in semi-monthly installments.

"Sec. 3. The police force of the City of Pontiac shall consist of a chief of police and seven regular policemen to be appointed by the mayor by and with the consent of the commissioners of said City, and such other special police to be appointed by the mayor from time to time as in his judgment emergency or necessity may require.

"Sec. 4. The regular police of the force shall be entitled to and shall receive the sum of nine hundred dollars per annum, payable in semi-monthly installments. Special police shall be entitled to and shall receive the sum of two and one-half dollars per day. In addition to the regular compensation of police officers, regular members of the force shall be entitled to and shall receive such fees for the services of process as is permitted by statute."

(19). That ordinance contains other sections with reference to the duties and salaries of the city clerk and other appointed officers,

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but no further provisions having any reference to police officers or the police force of said city.

(20). On the 11th day of March, 1912, said commission amended section 4 of said ordinance (such amendment to take effect on the first Monday of May, 1912) so as to read as follows:

"Sec. 4. The regular police of the force shall be entitled to and shall receive the following compensation, to wit: New men, at the rate of nine hundred dollars per annum for the first year; nine hundred and fifty dollars per annum for the second year; and the sum of one thousand dollars per annum for the third year and subsequent years. Men who have served on the police force of said city one year shall receive the sum of nine hundred and fifty dollars per annum for the first year's service under this ordinance, and one thousand dollars per annum for the second year and subsequent years, and men who have served on the police force of said city for two years shall receive the sum of one thousand dollars per annum for the first year under this ordinance and the sum of one thousand dollars per annum thereafter, all of said sums payable in semi-monthly installments; special police shall be entitled to and shall receive the sum of two and 50-100 dollars per day. In addition to the regular compensation the police officers and regular members of the force shall be entitled to and shall receive from other sources such fees for the service of process as is permitted by statute for sheriffs and constables."

(21). The appointment of the chief of police has from year to year been submitted to the commission for their approval, but the appointment of the police, regular or special, has never been submitted to the commission for approval, nor has their dismissal from service been submitted to the commission. They have been hired or discharged by the mayor at will.

(22). Section 21, chapter 7, of the charter, in the enumeration of the municipal powers of the commission, and their right to enact ordinances, contains this language: "May enact all laws and ordinances relating to its municipal concerns, and shall have and exercise all governmental and police powers, subject to the limitations prescribed by this charter, the Constitution and laws of the State and of the United States."

(23). The deceased, Millard F. Blynn, was appointed a policeman of the City of Pontiac, January 2, 1912, by Robert J. Lounsbury, then mayor of said city, by a written appointment, of which the following is a copy, to wit:

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"Pontiac City Commission.

"R. J. Lounsbury, Mayor.
"Dick Dewey, Commissioner.
"Wm. H. Osmun, Commissioner.

"Pontiac, Mich., Jan. 2-12.

"I hereby appoint Millard Blynn as policeman for the City of Pontiac.

"R. J. Lounsbury, Mayor."

and on said day executed and filed with the city clerk of said city the following oath of office, to wit:

"STATE OF MICHIGAN
"COUNTY OF OAKLAND ss.

"I do solemnly swear that I will support the Constitution of the United States, and the Constitution of this State, and that I will discharge the duties of the office of policeman of the city of Pontiac, said county and State, to the best of my ability.

"Millard F. Blynn.

"Subscribed and sworn to before me this 2d day of January, A. D. 1912.

"R. J. Lounsbury,
"Notary Public, Oakland County, Mich.

"My commission expires Jan. 26, 1913."

(24). From his said appointment to the time of his death, said deceased was regularly paid semi-monthly his salary, at the rates fixed by the above specified ordinance made and passed April 29, 1911, and the above specified amendment thereof, such several installments being first audited and allowed by the commission of said city while in session as such commission by resolution thereof, and during all said term all the members of said commission knew that he was acting as a policeman in said city.

KUHN, J. (*after stating the facts*)

Section 7, pt. I, Act No. 10, Pub. Acts 1912 (Extra Session), (2 How. Stat. [2d Ed.] P. 3945), provides in part as follows:

"The term 'employee' as used in this act shall be construed to mean:

"(1). Every person in the service of the State, or of any county, city, township, incorporated village or school district therein, under any appointment, or contract of hire, express or implied, oral or written, except any official of the State, or of any county, city, township, incorporated village or school district therein."

The decision of the Industrial Accident Board can be

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affirmed only if it is found that a policeman of the City of Pontiac, under the facts stipulated, is an employe and not a public officer.

Policemen generally are charged with the especial duty of protecting the lives of citizens within certain territorial limits, and of preserving the public peace. The preservation of the public peace being a matter of public concern, it has therefore been said that policemen may be considered as public officers. As a rule, they are appointed under authority given by the State, and therefore have generally not been regarded as servants or agents or as otherwise bearing a contractual relation to the municipality. *Schmitt* v. *Dooling*, (140 S. W. 197, 145 Ky. 240, 36 L. R. A. (N. S.) 881, and note, Am. & Eng. Ann. Cas. 1913 B, 1078).

Chief Justice Marshall distinguished an office from a simple employment in the case of *United States* v. *Maurice*, 2, Brock. U. S. 96, 103, Fed. Cas. No. 15747, as follows:

> "Although an office is an 'employment,' it does not follow that every employment is an office. A man may be certainly employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if the duty be a continuing one, which is defined by rules prescribed by government, and not by contract, which an individual is appointed by government to perform who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a change of employment from an office or the person who performs the duties from an officer."

In the case of *Throop* v. *Langdon*, 40 Mich. 673, Mr. Justice Cooley expresses the distinction as follows:

> "The officer is distinguished from the employee in the greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and usually, though not necessarily, in the tenure of his position."

The court of criminal appeal of Texas has decided that "a policeman of a city is a public officer holding his office as a

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trust from the State, and not as a matter of contract between himself and the city; the word applying equally to every member of the police force," and that "a policeman is a public officer of the State expressly charged by the statutes with enforcing a large body of the criminal law." *Ex parte, Preston*, (Tex. Cr. App.), 161 S. W. 115. See also *Woodhull* v. *Mayor*, 150 N. Y. 450, (44 N. E. 1038); 2 McQuillan on Municipal Corporations, p. 940; 5 Id. p. 5049; 28 Cyc. p. 497.

Counsel for applicant does not, however, take exception to these authorities as to the status of a policeman generally, but says that they do not bear upon the situation here presented, because the City of Pontiac in its charter has determined it and has classified its policemen as employes. Assuming that the position of counsel for the applicant is tenable, that the city has the authority under the home rule provision of the Constitution to determine that a policeman, who generally would be regarded as an officer, should for the purposes of the workmen's compensation law be regarded as an employe (which we do not decide), we are not satisfied that such a conclusion is the proper one to arrive at upon a careful study of the various charter provisions with reference to the police force of the city of Pontiac. A study of these various provisions is convincing that it was the purpose therein manifested to leave the policemen in the category of appointive officers, and not to make them merely employees. This, we think, is apparent from the wording of sections 5 and 6 of chapter X of the charter, which provides as follows:

"Sec. 5. The Police Department shall consist of the chief of police and as many subordinate officers, policemen, and employees as the Commission shall by ordinance determine.

"Sec. 6. The commission shall by ordinance make and establish rules for the regulation and government of the police department, prescribe and define the powers and duties of the officers and employees of such department, and shall prescribe and enforce such police regulations as will most effectually preserve the peace and good order of the city, preserve the inhabitants from personal violence, and protect public and private property from destruction by fire and unlawful depredation."

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It is clear that in the department of police it is sought to distinguish between officers and employees, and in section 5 policemen are spoken of independently of employes.

It is true that section 10 of chapter VII, which provides that each member of the commission shall have authority to employ such employes as may be necessary to conduct their several departments in an efficient manner, and that such employees may be discharged at the pleasure of the member making such employment, is the only section in the charter which provides for the appointment of policemen. But, in view of the distinction clearly made in the sections with reference to the police department, the word "employees" used in this section should not be held to have been used in any other than the comprehensive sense of including all persons serving the public in these departments, whether filling an appointive office or merely occupying a temporary contractual relation to the municipality as an employe; and this use of the word should not be held to deprive a policeman of the city of Pontiac of the dignity and importance which it is generally recognized attaches to his position.

It is said that in the case of *Attorney General* v. *Cain*, 84 Mich. 223 on page 227 (47 N. W. 484 on page 485), it was held that a policeman was not a public officer. But that was a *quo warranto* proceeding, and the court said:

"We do not think the position of policeman, under these circumstances, is such an office as authorizes the Attorney General to file an information by *quo warranto* in this Court to test the title to the position. It was said in *People* v. *DeMill*, 15 Mich. 182, (93 Am. Dec. 179,) that

" 'There are grades of positions denominated "offices" which do not rise to the dignity of being entitled to the notice of the attorney general by information.' See, also, *Throop* v. *Langdon*, 40 Mich. 686.

"It is certain that the intent of the charter is that these policemen shall be subject to the orders and direction of the common council, and that such council has the power at any time to remove them."

This case was referred to in the later case of *Trainor* v. *Board of Auditors*, 89 Mich. 162 (50 N. W. 809, 15 L. R. A. 95). While this latter case says that a policeman in the city

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of Adrian is not a public officer, referring to *Attorney General* v. *Cain, supra,* it must be said that this decision goes only to the extent of holding that since in that city policemen were removable by the council at pleasure, it would be useless for the attorney general to institute proceedings to determine who was entitled to the position. Under these circumstances it was not such an office as would authorize the attorney general to file an information by *quo warranto* in this court to test the title to the position.

Being satisfied that a policeman is an appointive officer under the provisions of the charter of this city, required to take an official oath of office, which it appears was done in this case, it follows that he came within the exception in subdivision 1, § 7, pt. 1, Act No. 10, Public Acts 1912 (Extra Session 2d Ed. § 3945), and is not an employe, as defined by said act, and therefore does not come within its provisions. Any effort to enlarge the scope of this act should be addressed to the Legislature.

The decision of the Industrial Accident Board will be reversed, and the claim of the applicant is disallowed.

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SUPREME COURT.

BERT H. GROVE,
Applicant and Appellee,
vs.
THE MICHIGAN PAPER COMPANY,
and
FIDELITY & CASUALTY COMPANY OF NEW YORK,
Respondents and Appellants.

MASTER AND SERVANT—PERSONAL INJURIES—WORKMEN'S COMPENSATION ACT—INDUSTRIAL ACCIDENT BOARD.

Upon appeal from findings of the Industrial Accident Board determining that claimant received his injuries as claimed by him from a strain which he received in lifting, where there was evidence tending to support the finding of the board, the judgment must be affirmed. Act No. 10, Extra Session 1912 (2 How. Stat. [2d Ed.] § 3939 *et seq.*).

Certiorari to Industrial Accident Board. Submitted November 13, 1914. Decided March 17, 1915.

Bert H. Grove presented his claim against the Michigan Paper Company for compensation to the Industrial Accident Board, which granted the award. Contestant and the Fidelity & Casualty Company of New York, its insurer, bring certiorari. Affirmed.

Charles H. Ruttle, for appellants.
Person, Shields & Silsbee, for appellee.

MOORE, J. This case is brought here by certiorari to the Industrial Accident Board. Mr. Grove claims that while he was in the employe of the Michigan Paper Company he received an accident which entitled him to compensation.

By proper proceedings the case found its way to the Indus-

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trial Accident Board, which affirmed that part of the award of the committee on arbitration, which established liability, but modified the amount of compensation allowed.

In its return to the writ of certiorari appears the following:

"The testimony taken on the hearing before the committee on arbitration was imperfectly taken and imperfectly transcribed; the testimony as actually transcribed, with the notes of the reporter showing omissions included, with the exception of qualifying questions being in narrative form, is hereto attached as Exhibit 4."

A finding of facts is returned which reads as follows:

"(1) The claimant, Bert Grove, was employed by one C. W. Breding of Plainwell, Mich., in February, 1913, and had worked for him for several months prior thereto as a blacksmith.

"(2) In March, 1913, the applicant, while so employed by said C. W. Breding, in the regular course of his duties shoeing horses, was suddenly jerked by one of the horses, causing a severe pain in the region of the groin. He continued to work for about two weeks and then went to see Dr. Stuck of Plainwell. Dr. Stuck gave him treatment and recommended that he see Dr. McNair of Kalamazoo. He went and saw Dr. McNair on April 5th, rested one day which was Sunday, and then returned to his regular work of horseshoeing, continuing such work until about July 1, 1913. During the month of July he was on his brother's farm spending his time in resting and fishing and was feeling well. The trouble caused by the jerk from the horse, which appears to have been an aneurysm, had practically disappeared.

"(3) On August 1, 1913, the applicant entered the employ of the Michigan Paper Company at Plainwell as a helper on the beaters at a wage of $2.00 a day; his duties being the lifting and moving of sacks of alum and sulphite and other material necessary in the manufacture of paper, such sacks varying in weight from 100 to 200 pounds.

"(4) On September 15, 1913, claimant, while loading a truck with the sacks mentioned, sustained the alleged accident, for which compensation is claimed in the following manner: 'I had lifted quite a number, but the last two days I was here the man who worked with me was sick and I had to do the work for two men. I was loading the truck, and stooped down to get the alum, and pulled one sack like this (motioned), and then I reached down like this (motioned) to pick up another and I felt this artery give way, * * * and I sat down on the floor.'

"(5) That the accident of September 15, 1913, caused a rupture of the femoral artery in the right leg, which immediately necessitated

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claimant's giving up his duties and undergoing an operation which was performed on September 26, 1913, at Kalamazoo, Mich. The condition of the Aneurysm at the time of the operation was very serious, being a pulsating tumor about four to six inches in diameter."

It is the claim of the defendants that the condition of Mr. Grove is due to what happened at the blacksmith shop in February, 1913, and not to what happened September 15th, 1913; while it is the claim of Mr. Grove that he had recovered from the strain he received in the blacksmith shop, and that his present condition was due to what happened in September, 1913.

It has already appeared that all the evidence taken before the board, is not returned. It also appears there is testimony in the record tending to establish each of these theories. This being the situation disclosed we do not understand that we are to weigh these conflicting claims.

In *Rayner* vs. *Sligh Furniture Company,* 180 Mich. 168 (146 N. W. 665), JUSTICE KUHN speaking for the court, said: "There being evidence to support this finding of fact by the terms of the act, (part 3, section 12, Act No. 10, Public Acts, Extra Session, 1912), it becomes conclusive."

Counsel for appellants argue many interesting questions which we think it unnecessary to pass upon now.

The judgment of the Industrial Accident Board is affirmed with costs against appellants.

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SUPREME COURT.

KATE VEREEKE,
Claimant and Appellee,
vs.
CITY OF GRAND RAPIDS,
Defendant and Appellant.

MASTER AND SERVANT—WORKMEN'S COMPENSATION—INDUSTRIAL ACCIDENT BOARD—STIPULATION—CONTRACTS—AMOUNT OF COMPENSATION—WAIVER.

Where claimant and contestant agreed and stipulated, in order to avoid expense, that the Industrial Accident Board should consider a claim for compensation as a full board as if the questions had been arbitrated and decision reached, also stipulating that the deceased earned $19.50 weekly, of which he contributed $12 to claimant, and where evidence was introduced at the hearing before the board by the claimant, without relying upon the alleged stipulation, and the board made an order granting $6 a week for three hundred weeks, the order of the board will not be reversed on the theory that it was bound by the amounts stated in the stipulation. Act No. 10, Extra Session 1912 (2 How. Stat. [2d Ed.] § 3939 *et seq.*).

Certiorari to the Industrial Accident Board. Submitted January 14, 1915. Decided March 17, 1915.

Kate Vereeke presented her claim for compensation for the accidental death of David Vereeke while he was employed by the city of Grand Rapids. An order awarding compensation is reviewed by claimant upon certiorari. Affirmed.

Ellis & Ellis, for claimant.
R. M. Ferguson, for defendant.

MOORE, J. This is certiorari to the Industrial Accident Board, brought by Kate Vereeke as claimant against the city of Grand Rapids, for compensation for the death of her son, David Vereeke, who was killed while in the discharge of his

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duties as an employe of the city of Grand Rapids. At the inception of this cause, the parties, desiring to avoid the expense and delay of arbitration, entered into a stipulation whereby they waived the action of arbitrators. The stipulation contained the following:

"That the arbitration of the matters in difference between the parties hereto, provided for in said Workmen's Compensation Law, be and the same is hereby waived, and the decision of said matters is hereby submitted to the Industrial Accident Board, sitting as a full board, the same as if this cause had proceeded to arbitration under said law and the decision on arbitration therein had been appealed from and said cause thereby brought before the full board on appeal from such decision. It is further stipulated and agreed that the decision of said board in this cause pursuant to this stipulation, and based upon the facts set forth herein, shall be valid and binding, and shall have the same validity, force, and effect as if said cause had proceeded in arbitration in due course, and was brought before the full board on appeal duly taken from the decision of an arbitration committee therein."

The stipulation showed the amount earned was $19.50 a week of which he contributed to his mother $12.00 a week.

This stipulation was signed on the 5th day of March, 1914. After the signing of it and before action was taken by the Industrial Accident Board, the father of the deceased, whom the mother had divorced, attempted to prevent the mother from obtaining any benefit under the Compensation law, and filed with the Industrial Accident Board objections to her claim, insisting she was not dependent upon her son. The return of the Accident Board contains the following:

"That a petition was filed in said cause by Cornelius Vereeke, the former husband of the applicant, Kate Vereeke, claiming for reasons set forth in said petition that the applicant, Kate Vereeke, was not entitled to receive or recover any compensation in said cause; that said cause came on to be heard before the Board on due notice to all the parties, said hearing being held at the office of the Industrial Accident Board on the 22d day of April, 1914, and that said Cornelius Vereeke did not appear at said hearing and did not offer or file any proofs tending to support his said petition; that on said hearing in said cause, said applicant, Kate Vereeke, was sworn as a witness in her behalf."

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After counsel for Mrs. Vereeke concluded his examination of her the following occurred:

"Mr. Reaves: Q. What other income did you have, Mrs. Vereeke, besides the $12.00 Dave gave you?

"A. John, my little boy, just commenced to work about a year ago next June, he ain't very strong, so he just got little odds and ends working in five-cent shows and like that. He went to school and worked after school in the Vaudette; he was usher there.

"Mr. Reaves: Q. That was all the income you had?

"A. John wasn't getting very much in the Vaudette, I got a little from him, and I had an old man there, I got some from him, too.

"Q. The old man boarded there?

"A. Yes, sir.

"Q. How much did you get from him?

"A. Four dollars.

"Q. How long was he boarding there?

"A. A couple of years.

"Mr. Allen: He was your father?

"A. Yes sir, he was my pa."

No further explanation was made of her relations with her father or her son John.

The Accident Board made an order allowing Mrs. Vereeke six dollars a week for three hundred weeks, and a present payment of $124. Mrs. Vereeke seeks a review of this order claiming:

"*First*: Assuming that the Board had the right to go outside of the stipulated facts, there was nothing in the evidence that could justify the decision of the Board.

"*Second*: The parties having agreed upon the facts, the statute delegated no authority to the Board to disregard the agreement.

"*Third*: The Board having authorized a stipulation, and the parties having stipulated, the agreement should be treated the same as a case made or a stipulation of facts by the parties in the case."

A great many authorities are cited to show that the Industrial Accident Board was bound by the stipulation. We think it clear, however, that the purpose of the stipulation was to avoid the necessity of a hearing before arbitrators, and to get the direct action of the Industrial Accident Board.

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Section 5, pt. 3, of Act No. 10, Public Acts, Extra Session, 1912, (2 How. Stat. [2d Ed.] § 3973), reads:

"If the employer, or the insurance company carrying such risk, or Commissioner of Insurance, as the case may be, and the injured employe reach an agreement in regard to compensation under this act, a memorandum of such agreement shall be filed with the Industrial Accident Board, and, if approved by it, shall be deemed final and binding upon the parties thereto. Such agreements shall be approved by said board only when the terms conform to the provisions of this act."

Section 11 provides what shall be done if a claim for review is filed. It is apparent from the record that when the divorced husband denied the right of the claimant to an order for support growing out of the death of her son, that claimant and her counsel proceeded upon the theory that a hearing before the Industrial Accident Board should be had. It was not then urged that the parties were bound by the stipulation but without objection the hearing was entered upon.

It is not necessary to intimate what the situation would have been if the claimant had relied upon the stipulation, nor what the effect would have been if she had explained more in detail her relations with her father and her son John. She did not do either of these things.

The order of the Industrial Board is affirmed.

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SUPREME COURT.

LILLIAN BAYNE,
Claimant and Appellee,
vs.
RIVERSIDE STORAGE & CARTAGE COMPANY,
Defendant and Appellant.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EVIDENCE—CAUSE OF DEATH.

Opinion evidence of two physicians that pneumonia did not result from injuries which decedent received in the course of his employment, and which were followed by his decease, contradicted by plaintiff's experts who gave a contrary opinion, *held*, not to justify the court in reversing the finding of the industrial accident board awarding compensation.

Certiorari by the Riverside Storage & Cartage Company and Standard Accident Insurance Company to the Industrial Accident Board to review a finding of the board awarding compensation to Lillian Bayne for the death of her husband, Harry Bayne. Submitted April 29, 1914. Affirmed July 24, 1914.

Keena, Lightner & Oxtoby, for appellants.
Frank C. Sibley, for claimant and appellee.

OSTRANDER, J. Claimant's intestate, an employee of the Riverside Storage & Cartage Company, died September 9, 1913; the cause of death being pneumonia. Whether the pneumonia was caused by an accident arising out of and in the course of decedent's employment was a question of fact, presented first to a board of arbitration and afterwards to the commission, both of which bodies answered it in the affirmative. Claimant's decedent was apparently a strong and well man and was employed in the labor of lifting and moving household furniture and other objects. He quit work the morning of August 27, 1913, after lifting, at apparent disadvantage,

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a heavy article, complaining that in lifting it he had hurt his back. He went to bed, and the next day a physician was called. In five days he became delirious. On September 6th Dr. Stockwell was called and had him removed to the hospital, where he died. Dr. Stockwell testified that when he examined the man on September 6th he displayed symptoms of pneumonia of two or three days' duration, his vitality was lowered, his condition debilitated, and he was delirious.

Both claimant and respondent were of opinion that a connection between the injury and the death could be established only by the opinions of men having extra knowledge of the subject, and therefore physicians, other than the one who attended deceased, were called and their opinions taken. Conduct of the deceased prior to the alleged injury was laid before them, it appearing that he had danced on a boat on the evening of August 24, 1913, had become heated, and complained of being chilled; that on August 25th and 26th he had worked as usual, making no complaints, had lifted and carried a heavy object in the afternoon of August 26th, and had complained that in setting it down he "must have kinked his back," and he said, on the morning of August 27th, that the jar of the wagon hurt his back when it crossed the street car track. Dr. Stockwell and Dr. Hitchcock testified there was no connection between the alleged injury and the pneumonia. Other physicians were of a contrary opinion, asserting the pneumonia to be directly caused by the injury. The case put by the plaintiff in certiorari, namely, that the employer is not liable to his employee for the consequences of disease superinduced by a physical condition, the result of the labors of the employment, is not the case before us. There is before us opinion evidence, disputed it is true, that the direct cause of the pneumonia was the hurt or strain of the back suffered by deceased August 27th. We do not understand it to be contended that, if the injury directly caused the cause of death, the employer would not be liable. Assuming that the court would have the right to brush aside wholly improbable expert testimony or correct the commission for not doing so, we do not feel warranted in

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saying that the opinion evidence favorable to claimant is wholly improbable. There is therefore a dispute of fact, which the commission has determined.

We find no error.

SUPREME COURT.

LEONE H. HILLS,
Applicant and Appellee
vs.
FRANK W. BLAIR, *ET AL.*,
Respondents and Appellant.

1. MASTER AND SERVANT—INDUSTRIAL ACCIDENT BOARD—DEATH—WORKMEN'S COMPENSATION LAW.

   Where a section hand was killed while he was returning home at noon for dinner, being struck by a passing train, the burden rested on his representatives to show, in proceedings before the accident board, that death resulted from an accident arising out of and in the course of his employment.

2. SAME—APPEAL AND ERROR—CERTIORARI TO INDUSTRIAL ACCIDENT BOARD.

   Findings of the industrial accident board which are supported by facts or inferences from the testimony must be taken as true on certiorari.

3. SAME—EMPLOYMENT—DINNER HOUR.

   Accidents to employees in the act of going to or from their work are not usually regarded as arising out of the employment or in the course thereof.

4. SAME—RAILROADS.

   The fact that decedent was still on the premises of his master, at a considerable distance from the place at which his work was done, did not bring him within the exception to the rule which has been recognized in certain cases when the servant was so near the

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place of his employment as in effect to be within the protection of the law.

Certiorari to the industrial accident board. Submitted June 22, 1914. Decided July 24, 1914.

Leone H. Hills applied for an award of compensation for the injury and death of her husband, Irwin E. Hills, an employee of Frank W. Blair and others as receivers of the Pere Marquette Railroad Company. From the award granted, defendants bring certiorari. Reversed.

O. C. Trask (*McArthur & Dunnebacke,* of counsel), for applicant.

Parker, Shields & Brown (*S. L. Merriam* and *J. C. Bills,* of counsel), for respondents.

STEERE, J. This is an appeal by respondents, as receivers of the Pere Marquette Railroad Company, from an award of compensation made by the Michigan industrial accident board for the accidental death of Irwin Hills, at Williamston, Mich., on November 16, 1912, while he was an employee of said railway, as a section hand. The facts in the case as testified to by witnesses are practically undisputed. The controversy is over inferences which may be drawn from the facts proven, and conclusions of law thereon.

On the day in question Hills was working during the forenoon at his regular employment in a section crew along respondent's railway track east of Williamston. The crew returned to Williamston with their hand car and stopped for dinner at the hand car house by the south side of the track shortly after 11 o'clock, standard time, putting the car inside preparatory to taking their meal. As they were returning, the smoke of a train coming from the east was seen in the distance. It was customary for the men to carry their dinners with them and eat together at or near where they were at work; but on this day deceased had not waited in the morning for his dinner to be put up by his wife, and hurried away

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to his work, saying that if he could get excused he would be home to dinner. After the men had put the hand car into the car house and the others were proceeding to eat their noonday meal, Hills took his coat and told the foreman that he was going home for his dinner, to which the foreman assented, and he hurried away. Just as he left the car house, the foreman, when reaching for his dinner pail, noticed a freight train coming from the east "about four or five pole lengths from the car house," meaning the distance between telegraph poles, and told Hills to look out for it. Answering that he would be all right, Hills hurried down the railway track in a westerly direction towards the station. The car house at which the section men ate their dinner was located 1,934 feet east of the station, while Hills' home was about half a block north of it; 225 feet west of the car house a street crossed the railway tracks intersecting a wagon road which ran east and west, parallel with the railroad and just to the north of it. One of the section hands saw Hills go west on the track as far as the street crossing. He could have left the railroad at that point by the public street and gone home along the wagon road on the same side of the railroad as his home. This road, however, though open to the public, was not in good condition for travel. The men employed in the yards were accustomed to enter and leave at the station, going to the car house and elsewhere along the tracks as they found it most convenient. There was also a footpath along the railroad right of way between the main track and a side track, upon which they could walk in safety. The freight train, which the foreman had noticed and warned Hills of, was coming from the east on the main track of the railway and passed through the village of Williamston without stopping. It was the custom of such trains when approaching Williamston to shut off steam and slow down to from 8 to 12 miles an hour until they could catch the signal, when, if a stop was not indicated, they would increase their speed and proceed without stopping. No stop signal was set for this train on the day in question, and it passed through the yards between the car house and the depot

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at an estimated speed of from 15 to 18 miles an hour. The conductor and fireman of the train testified that before catching the signal the train slowed down to 10 or 12 miles. A witness named Whipple, who was loading a car with hay at some sheds located 12 or 15 rods west of the hand car house, testified that as the train was approaching he saw a fellow coming from the west on a run pulling on his coat, and noticed him stop on the north side of the track and look to the east; from his actions witness thought he was a brakeman waiting for the train, and that the train stopped, but "they hit up quite a clip just as soon as the engine got by there;" that this was about 50 rods from the place where the man was killed by the switch. Being asked if the man he then saw was deceased, he replied:

"It was a man with a fur cap on, and when I see who was lying on the ground it looked just like the coat he was putting on and the cap he had on, and that is all I know about it."

A short time after the train had passed, the body of Hills was found lying beside the main track approximately 950 feet west of the hand car house and about 1,000 feet east of the depot near a stub switch, a lantern prong of which was bent to the west. There were no eye witnesses to the accident. The manner in which it occurred was a matter of inference from surrounding facts and circumstances proven.

It was the theory in behalf of claimant that deceased was accidentally struck by the train as he was traveling along the track towards his home and thrown against the switch standard which stood about 20 feet east of where his body was discovered. Respondents contended that shortly after leaving the car house, and near the highway crossing, deceased boarded the train, which was moving slowest at that point, intending to ride as far as the depot, near his home, and drop off, but that as the train increased its speed on approaching the depot, after ascertaining that there was no signal set for a stop, he either jumped or fell, striking the switch standard, and was thereby killed.

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The industrial accident board apparently adopted claimant's theory that deceased walked, or ran, along the railway ahead of the oncoming train for a distance of 930 feet from where he left his fellow workmen at the car house, before the train overtook him at the switch, when, as he started to pass by the light standard on the south near the track, he "walked a little too close to the car and was struck by the train and thrown against the light standard; the force of the impact hurling his body about 20 feet to the west." The board found as a fact that deceased, on his way from the car house to his home for dinner, "was accidentally struck by said train while he was traveling towards the depot and was thrown against the swtich standard mentioned in the evidence, causing death." As a conclusion of law it found that:

> "He was still his master's servant while so in the act of leaving his employment, and that the employment covers not only the time during which the workman is engaged in his ordinary labor, but also a later time during which he is passing from the surroundings of his employment into surroundings unrelated thereto." Also holding "that deceased was killed by an accident arising out of and in the course of his employment."

Under the provisions of this act, only that employee is entitled to compensation who "receives personal injuries arising out of and in the course of his employment." It is to be borne in mind that the act does not provide insurance for the employed workman to compensate any other kind of accident or injury which may befall him. The language of the Michigan compensation law is adopted from the English and Scotch acts on the same subject, and, in harmony with their interpretations, has been construed by this court, in *Rayner* v. *Furniture Co.*, 180 Mich. 168 (146 N. W. 665), as meaning that the words "out of" refer to the origin, or cause of the accident, and the words "in the course of" to the time, place, and circumstances under which it occurred.

In *Ayr Steam Shipping Co., Ltd.*, v. *Lendrum*, 6 B. W. C. C. 326, involving a fatal accident attended with uncertainty as to details, the court said:

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"I think one may deduce from the decisions (1) that the burden is always upon the applicant to prove that death resulted from an accident arising out of as well as in the course of the employment; (2) that such proof need not be direct but may be by circumstantial evidence, but there must be facts from which an inference can be drawn, as distinguished from mere conjecture, surmise, or probability; and (3) that an award by an arbiter cannot stand unless the facts found are such as to entitle him reasonably to infer his conclusion from them."

It is contended by appellants that the facts proven here do not in reason support the inference of the board as to the manner in which deceased met his death, but, on the contrary, conclusively show that he was killed in an attempt to board or leave a moving train, precluding any award under the ruling in *Pope* v. *Hill's Plymouth Co.*, 5 B. W. C. C. 175, in which case a workman in a colliery going home to his dinner on the premises of his employer was killed in attempting to jump on a passing tramcar. It is further urged as a defense that, if it cannot be said as a matter of law a finding of fact should have been made as appellants contend, it should at least be held that the proven facts are equally consistent with either one of the two alternatives, and no inferences can legitimately be drawn to support an award.

We are not prepared to hold that the findings of fact, as to the manner of the accident, are entirely without evidential support, either direct of by inference. They are therefore to be taken as conclusive under the statute. Accepting them as such, do they sustain the conclusion of law that Hills' death arose out of and in the course of his employment.

It is well settled that the burden rests upon the one claiming compensation to show by competent testimony, direct or circumstantial, not only the fact of an injury, but that it occurred in connection with the alleged employment, and both arose out of and in the course of the service at which the injured party was employed.

While occasional exceptions are noted, as in the case of most rules, it is laid down by the authorities as a general rule that accidents which befall an employee while going to or from

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his work are not to be regarded as in the course or arising out of his employment. Boyd on Workmen's Compensation, § 486; Harper on Workmen's Compensation, § 34; 1 Bradbury on Workmen's Compensation (2d Ed.), p. 404.

This inquiry, therefore, narrows down to whether this is an exception to the general rule. As deceased was doing no work he was required to perform in fulfillment of his contract of employment, the contention that it is an exception rests mainly upon the claim that when killed he was yet on the premises of his employer, going from, and in the vicinity of, his place of employment. No question is involved of exceptions by the terms of hiring, of the employee being required to work overtime, or of any interruption, unusual kind of work being done, or other special circumstances in connection with the employment. The only unusual and special thing shown in that connection is the fact that at the noon hour, contrary to previous usage and custom, he left his place of employment and fellow workmen to go elsewhere on a mission of his own, not connected with his employer's business, but to please himself; the occasion being that he had failed to bring with him his dinner as was customary with the crew and as he had always done before. Can it be said he was then engaged in his employer's business, discharging any duty or on any errand connected with his employment?

In applying the general rule that the period of going to and returning from work is not covered by the act, it is held that the employment is not limited by the exact time when the workman reaches the scene of his labor and begins it, nor when he ceases, but includes a reasonable time, space, and opportunity before and after, while he is at or near his place of employment. One of the tests sometimes applied is whether the workman is still on the premises of his employer. This, while often a helpful consideration, is by no means conclusive. A workman might be on the premises of another than his employer, or in a public place, and yet be so close to the scene of his labor, within its zone, environments, and hazards, as to be in effect at the place and under the protection of the act,

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while, on the other hand, as in the case of a railway stretching endless miles across the country, he might be on the premises of his employer and yet far removed from where his contract of labor called him. The protection of the law does not extend, except by special contract, beyond the locality, or vicinity, of the place of labor.

"It is not a sufficient test that the workman should be on the premises of the employer; but it may be sufficient that he is in such a state of proximity as may be treated as a reasonable margin in point of space." *Hoskins* v. *Lancaster*, 3 B. W. C. C. 476.

Upon this subject, and leading directly to the protection which the act gives the employee during the noon intermission, it is said in Boyd on Workmen's Compensation, § 481:

"A workman's employment is not confined to the actual work upon which he is engaged, but extends to those actions which by the terms of his employment he is entitled to take or where by the terms of his employment he is taking his meals on the employer's premises. (*Brice* v. *Lloyd*, 2 B. W. C. C. 26.) In other words a workman does not lose his character as a workman while eating his lunch on his employer's premises at a place where he may safely do so and not at an especially forbidden place or place of obvious danger. But this rule would not apply to cases where the employee leaves the premises of his employer to eat his lunch during the time set apart for this purpose."

To the same effect it is said in Ruegg on Employers' Liability and Workmen's Compensation, p. 377:

"In one sense, it may be said to be a part of his duty to get to such place, but if his method of traveling is not controlled by the employer, if he is a free agent, it is thought this qualified duty is not sufficient to raise, at the time, the relation of employer and workman.

"The same may be said with respect to the time occupied in returning home from work, and of intervals allowed for meals when spent off the employer's premises."

The rules of presumption and inference which often go far to assist a claimant in establishing his case where a workman is found dead at the scene of his labor are of scant application

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here. When the employee dies at his post of duty, a presumption may reasonably be entertained that he was then performing his duty and engaged in the work for which he was employed, from which a causal relation between his employment and the accident may be inferred; but it is shown here that deceased left the locality and sphere of his employment at a time when work was suspended, that he was doing nothing within the scope of his employment, was not under the direction or control of his employer, and went away for purposes of his own, going where and as he pleased. Though he was traveling on his employer's premises when injured, he was then 950 feet away from where any duty in the line of his employment called him, and had selected his own route. But a short distance from where he left the car house he could have turned by a public street onto a wagon road along which he could have gone to his home, and a safe footpath was also available to him along the right of way. The custom of employees to travel along the railroad in going to and from their work, when it is shown that there was another and safe way which they might have taken, is not of controlling importance. At the same distance deceased was injured, from the place of employment, they would be at most but mere licensees. In *Caton* v. *Steel Co.*, 39 Scot. L. R. 762, it was held that the injury did not arise out of and in the course of the employment of a laborer who, at the conclusion of his day's work, was knocked down and killed by a passing engine 230 yards from where he had been working, while walking home along a private railway track belonging to his employer, which many of the men employed at the same place were in the habit of using in going to and from thier work. The court there said:

"The deceased at the time of the accident had ceased his work, had left the place where he did it, and was on his way home. He had at the time no duty to fulfill to his master, and his master had no duty to fulfill towards him. The relation of master and servant had ended for the day, he having fulfilled his work and left the place where his work was being done."

Under the undisputed testimony in this case, and accepting

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the findings of fact made by the board as conclusive, claimant has failed to show such relations of cause and effect between the accident and the duties of the party injured to his employer as will support a conclusion of law that the injury arose out of and in the course of the employment.

The decision, or award, herein is therefore reversed and set aside.

SUPREME COURT.

MRS. RUDOLPH RECK,
Applicant and Appellee,
vs.
FRANK B. WHITTLESBERGER,
Defendant and Appellant.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INDUSTRIAL ACCIDENT BOARD—EVIDENCE.
Findings of fact handed down by the industrial accident board, on hearings pursuant to statute, are conclusive, in the absence of fraud, if any competent, legal evidence is produced to sustain the facts so found. Act No. 10, Extra Session 1912 (2 How. Stat. [2d Ed.] § 3939 *et seq.*).

2. SAME—HEARSAY—ESTATES OF DECEDENTS.
Although statements made by an injured employee relating to his feelings, mental or physical, are admissible in evidence in proceedings under the compensation act, statements made as to the cause of the accident or source of injury are not admissible. But it is not required by the statute that the decision of the board must in all cases be reversed because error may have been committed in the admission of incompetent testimony, when there appears in the record a legal basis for its findings.

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3. SAME—REPORT OF ACCIDENT.

An employer's official report of an accident, filed with the industrial accident board, as required by law, where the employer had ample opportunity to satisfy himself of the facts, and all sources of information were at his command when he made the report, may be taken as *prima facie* evidence that an accident occurred in the manner set forth, which fact the evidence did not tend to controvert.

Certiorari to the Industrial Accident Board. Submitted April 30, 1914. Decided July 24, 1914.

Application to the Industrial Accident Board for an award of compensation against Frank B. Whittlesberger for the death of Rudolph Reck. A judgment for the applicant is reviewed by said Whittlesberger on writ of certiorari. Affirmed.

Bowen, Douglas, Eaman & Barbour, for appellant.
John Dohrman, for appellee.

STEERE, J. This case is before us upon a writ of certiorari to review a decision or determination of the industrial accident board of Michigan affirming an award of $2,250 made by a committee of arbitration against Frank B. Whittlesberger, the appellant, in favor of the widow of Rudolph Reck, whose death is charged to have resulted from an injury sustained while in appellant's employ. The proceedings were instituted and conducted under and by virtue of Act No. 10, Pub. Acts 1912 (Extra Session).

Pursuant to section 11 of said act the industrial accident board reviewed the decision of said committee of arbitration and such records as were kept by it, including the testimony it had taken. The return to this writ states, with some slight corrections which are made, that all the material testimony is correctly and sufficiently set forth in appellant's petition for a consideration of the questions raised.

The record discloses that on January 12, 1913, said Rudolph Reck, a baker by trade, died at a hospital in Detroit of septic pneumonia, which resulted, as his physician testified, from

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systemic sepsis developed from an infected wound in his hand, claimed to have been caused, on December 26, 1912, by a nail in some fuel with which he was firing an oven in appellant's bakery on Randolph street, in said city, where deceased was then employed.

The bakeshop or room in which deceased was working at the time it is alleged he sustained the initial injury was about 100 feet long and 40 feet wide, and on that day two other bakers were at work in the room with him, a boy also being with them in the afternoon. Deceased finished his work for the day as usual, and left at the regular quitting time, which was about 7:30 p. m. His daughter testified that he arrived home that evening a litle later than his customary time, and showed her an injury where he had hurt his hand at or near the thumb, stating that he chopped up a box and "ran a nail in his thumb." He worked full time at the shop the next day and until 4 p. m. the succeeding day. During this time the men with whom he worked saw and heard nothing of any accident; neither did they observe anything unusual in his work or conduct. He did not, however, return to work after December 28th, the day on which he quit at 4 o'clock.

Dr. Smith, the only medical witness who testified, first treated deceased on January 2, 1913. At that time his employer and fellow bakers were first informed of the claim that he had sustained an injury while at his work. Dr. Smith testified, as before stated, that septic trouble originating with the wound in the hand spread generally throughout the system and resulted in pneumonia, which ended fatally. This is not controverted, but it is urged that no competent evidence was produced showing where or how deceased injured his hand, or that the injury arose out of and in the course of his employment.

Following a claim regularly made for compensation by the widow under said Act No. 10, generally known as the workmen's compensation act, a committee of arbitration was selected, as provided by the act, and hearings were held. One of said hearings was at the bakery where the injury was claimed

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to have been received. None of the employees saw the accident or were shown to have personal knowledge of when or how it occurred. The committee then threw the door wide open for hearsay evidence, and, against objection, entertained any testimony offered as to what witnesses had heard deceased and others say about it.

Appellant's assignments of error are as follows:

"*First.* In holding that there was sufficient proof that Rudolph Reck received a personal injury arising out of and in the course of his employment to justify a decree in favor of the claimant.

"*Second.* In holding that hearsay evidence offered for the purpose of proving that the deceased received a personal injury arising out of and in the course of his employment was admissible, and denying the objection of your petitioner to its admission.

"*Third.* In determining and ordering your petitioner to pay the said widow the sum of $2,250, and costs, as compensation for the injury and attendant death of Rudolph Reck."

The third assignment is manifestly contingent on the other two, and calls for no separate consideration. The first and second present the two questions of whether this unrestricted admission of hearsay testimony was reversible error, and whether there was any competent evidence in the case on which to base a finding that the injury complained of arose out of, and in the course of, deceased's employment.

At the threshold of this inquiry we are confronted with the proposition that the board is made by the law creating it the final tribunal as to the facts, and, it having made a finding of facts legally sufficient to support the award, its decision cannot be questioned by the court.

Section 12 of part 3 of said act provides:

"The findings of fact made by said industrial accident board acting within its powers, shall, in the absence of fraud, be conclusive, but the Supreme Court shall have power to review questions of law involved in any final decision or determination of said industrial accident board: *Provided*, that application is made by the aggrieved party within 30 days after such determination by certiorari, mandamus or by any other method permissible under the rules and practice of said court or the laws of this State, and to make such further orders in respect thereto as justice may require."

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As a legal conclusion, no one will deny that in any judicial proceeding the competency of testimony offered in support of or against any material fact is a question of law. It does not follow, however, that the appellate court in all instances must set aside an adjudication because of erroneous admission or rejection of evidence. The doctrine that prejudice is always presumed from error is not accepted by all students of jurisprudence with complacency, even in those jurisdictions where the doctrine prevails. Neither do we conceive that in reviewing decisions of this board all technical rules of law, often made imperative by precedent in reviewing the action of regularly constituted trial courts, must be applied. The board is purely a creature of statute, endowed with varied and mixed functions. Primarily it is an administrative body, created by the act to carry its provisions into effect. Supplemental to this, in order that it may more efficiently administer the law, it is vested with quasi judicial powers, plenary within the limits fixed by the statute. Along the lines marked out by the act it is authorized to pass upon disagreements between employers and claimants in regard to compensation for injuries, and to that end make and adopt rules for a simple and reasonably summary procedure. Hearings are to be held upon notice to parties in interest; compulsory process for attendance of witnesses and power to administer oaths is given; the parties in interest are entitled to notice, to be heard and to submit evidence; a review, findings, a decision, and an award of compensation are provided for, though in the final test resort must be had to the courts to enforce the awards. In those proceedings the board does not act solely as a mere arbitrator. It has various plenary powers well defined, and its status is unique in the particular that it performs in combination both administrative functions and certain of the duties of a court, a referee, and an arbitration board. Its findings of facts upon hearings are conclusive, and cannot be reviewed, except for fraud, provided, necessarily, that any competent, legal evidence is produced from which such facts may be found. Facts cannot be evolved from the inner consciousness of that tribu-

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nal on bare supposition, guess, or conjecture, nor on rumor or incompetent evidence. To so determine the rights of parties would be to act outside the authority conferred by the act, and without jurisdiction.

While it was evidently the intent of this law that, by concise and plain summary proceedings, controversies arising under the act should be properly adjusted, under a simplified procedure unhampered by the more technical forms and intervening steps which sometimes cumber and delay regular litigation, yet the language of the act, and provision for review of questions of law, indicate clearly an intent that the elementary and fundamental principals of a judicial injuiry should be observed, and that it was not the intent to throw aside all safeguards by which such investigations are recognized as best protected.

The rule against hearsay evidence is more than a mere artificial technicality of law. It is founded on the experience, common knowledge, and common conduct of mankind. Its principles are generally understood and acted upon in any important business transaction or serious affair in life. In such matters men refuse to reply on rumor or what some one has heard others say, and demand the information at first hand. The common, instinctive weight usually given such evidence is illustrated by this statement of Dr. Smith, after relating what deceased told him as to how he hurt his hand, "I don't know anything about it;" and of Mrs. Taylor, a daughter of deceased, who, in connection with her testimony as to what she had been told, said, "I really don't know myself; * * * the only thing I know about this matter is that the night I went home they took him to the hospital." The danger and unreliability of hearsay testimony is well exemplified in her evidence. She testified that Haberstoh, a fellow workman in the shop, saw the accident and described it to her, as she related it while testifying. This, on the surface, would seem to be about as satisfactory and convincing hearsay evidence as could be produced. Had Haberstoh been unavailable, it would have been equally competent and uncontrovertible,

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but it was shown by Haberstoh himself that he saw nothing of any accident, and obtained his information from Charles Ruskei, the boy who worked in the shop afternoons, who himself saw nothing, but heard deceased state how he hurt his hand.

Coming directly to this line of testimony as applied to workmen's compensation cases, it is said in Boyd on Workmen's Compensation, p. 1123:

"The statements made by an injured man as to his bodily or mental feelings are admissible, but those made as to the cause of his illness are not to be received in evidence. The rule applies to statements made by a deceased workman to a fellow workman as to the cause of his injury."

And more fully in Bradbury on Workmen's Compensation, p. 403, as follows:

"The statement made by an employee in the absence of his employer, by a deceased man, as to his bodily or mental feelings are admissible in evidence, but those made as to the cause of his illness are not admissible in evidence and where there is no other evidence of an accident arising out of and in the course of the employment than statements made by a deceased employee in the absence of his employer, an award cannot be sustained."

In *Gilbey* v. *Railway Co.*, 3 B. W. C. C. 135, where a workman at a meat market on arriving home told his wife that he had broken his rib when trying to save some meat from slipping into the dirt, the court said:

"To hold such statements ought to be admitted as evidence of the origin of the facts deposed is, I think, impossible. Such a contention is contrary to all authority."

This rule is emphasized to the extent of even holding admission of such evidence reversible error in *Smith* vs. *Hardman & Holden, Ltd.*, 6 B. W. C. C. 719, because the mind of the trial court might have been "colored by his admitting statements which are inadmissible as evidence."

We do not think, however, that under the language used in our workmen's compensation act the decisions of its adminis-

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trative board must be in all cases reversed under the rule of presumptive prejudice, because of error in the admission of incompetent testimony, when in the absence of fraud, there appears in the record a legal basis for its findings, which are made "conclusive" by statute when said board acts within the scope of its authority.

As a part of the plan for a practical administration of this law, section 17 of part 3 requires each employer who elects to come under the provisions of said act to keep a record of injuries "received by his employees in the course of their employment," and within ten days after an accident resulting in personal injury to report the same in writing to the industrial accident board, on blanks printed for that purpose.

The first knowledge which came to the board of this accident is contained in the report of appellant, made by an admitted agent. It is dated January 9, 1913, and marked "First Report of Accident." It states, amongst other things, that on December 26, 1912, Reck, a baker by trade, was injured; the "cause and manner of accident" being that he "was throwing wood in furnace and a nail run in left hand inflicting a deep gash." This report was made three days before Reck's death, and indicates that the employer, or his representatives, had full notice of the injury, with ample opportunity to investigate while Reck was alive, and all sources of information were both fresh and available. A second report, after Reck's death, made on January 15, 1913, giving the same date of the accident, etc., states of its "cause and manner:"

> "The injured was throwing wood in the fire and a nail scratched his left hand. He worked for two or three days after the accident, when the hand became infected, and he was sent to the hospital. After the hand had started to heal nicely he contracted bronchopneumonia, which disease caused his death January 13, 1913."

We think that such reports from the employer, where all sources of information are at his command when the reports are made, and he has had ample opportunity to satisfy himself of the facts can properly be taken as an admission, and, at

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least, as *prima facie* evidence that such accident and injury occurred as reported.

No evidence was offered to impeach the reports or to show that the accident occurred otherwise than as stated in them. Eliminating from consideration the hearsay testimony erroneously admitted, which could not affect either way the legal significance of such reports, the record furnishes legal support for the findings of fact made. Consequently such findings are to be recognized as conclusive under the statute.

The decision of said industrial accident board is therefore affirmed.

SUPREME COURT.

ANNA ANDREJWSKI,
Claimant and Appellee,
vs.
WOLVERINE COAL COMPANY,
Defendant and Appellant.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—DEATH—CONSTRUCTION OF STATUTE.

Act No. 10, Extra Session 1912, providing compensation for injuries to employees, or for their death in the course of their employment (2 How. Stat. [2d Ed.] § 3939 *et seq.*), is in derogation of the common law and should be strictly construed, although it is a remedial statute and creates a right against one who would not otherwise be liable.

2. SAME—AMOUNT OF COMPENSATION.

Where a servant has worked in his employment for practically the whole year preceding his injury, his average annual earnings are known or ascertainable and the average weekly wages are to be determined by finding one fifty-second of the annual earnings.

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3. SAME—TERM OF EMPLOYMENT.

If the workman has not been employed during substantially the entire year, but his daily wage or salary is fixed, or known, his average earnings as a basis of compensation will be 300 times the daily wage or salary. In case his employment has been limited in term, or there is insufficient data from which to determine his annual earnings, they are to be determined by taking 300 times his daily wage or salary, or the daily wage of similar workmen in like employment.

4. SAME—IRREGULAR EMPLOYMENT.

Decedent worked in a coal mine in the Saginaw valley. The employment was not continuous, but operations were carried on for an average of 211 days in a year. Payment was fixed by contract on the basis of the number of tons produced, and the amount that each miner received depended on the coal which was sent up on his number. During the year which preceded the death of deceased, the mine in which he was employed was operated 148 days, and he received $507.45. While the mine was not in operation, he worked as a cement block layer for another employer, earning nearly the same amount of wages. *Held*, that the first three classes mentioned under section 11 of the compensation act were intended to include workmen who were employed during substantially the whole year prior to the accident, and that it would not be reasonable or fair to apply such methods of compensation to the case of deceased, and that the average annual earnings should be computed on the basis of the average for the preceding eight years, as provided by the fourth classification under this section of the law.

Certiorari to the industrial accident board. Submitted November 5, 1913. Decided October 2, 1914. Rehearing denied January 29, 1915.

Anna Andrejwski presented her claim for compensation for the death of her husband, Joseph Andrejwski, against the Wolverine Coal Company. From the order entered awarding compensation, contestant brings certiorari. Reduced and judgment entered.

George M. Humphrey (*Humphrey, Grant & Humphrey*, of counsel), for appellant.

Coumans & Gaffney, for appellee.

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McALVAY, C. J. This case is brought to this court by the appellant upon a writ of certiorari to review the decision and order of the industrial accident board in affirming an award theretofore made in said cause by the arbitration committee therein. There appears to be but little dispute upon the material facts in the case.

Joseph Andrejwski, deceased, was claimant's husband, employed by appellant in its mine No. 2. On November 18, 1912, in the course of his employment, he came to his death by an accident, which occurred without fault of either party. At this time both the employer and employed had voluntarily made their election to come under and be governed by the employers' liability and workmen's compensation act, being Act No. 10 of the Public Acts of Michigan, Extra Session, 1912. (2 How. Stat. [2d Ed.] § 3939 *et seq.*) Claimant is the sole dependent of deceased entitled to such compensation as may be granted under said act. Deceased had worked as a minor continuously in this mine for ten years before this accident, during all of the time the mine was being worked. This is a coal mine operated by appellant, and is located near Bay City in the Saginaw valley district. This is the principal coal mining district in this State, and includes the operation, under similar conditions, of a number of companies and mines. The mine in question and the other mines in this district do not run continuously during the entire year; some entirely suspend operations for several months during the summer, and others do not operate during a portion of each month, in a measure caused by the fact that operations are controlled by the sales of the product, which depend entirely upon orders. Operations also depend upon weather conditions.

The record shows that no mine in the district runs or has ever run 300 days in the year. It also appears from the operations of these mines for the years 1909 to 1912, inclusive, that the coal mining industry in this district has been carried on on the average for only 211 days in each year.

The miners are paid on contract by the ton and work on numbers. The amount paid depends on the amount each miner

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sends up on his number. Two or three miners may work together and send up the coal on the number of one of them. The price paid miners is regulated by what is called a "scale" made between the operators and the union, and one of the things always taken into consideration in fixing the wages of miners in this district is that the mine does not run steadily and the miner can only work when it does run.

For the year immediately preceding deceased's death, mine No. 2, in question, was operated 148 days. On his number coal was sent up 131 days for which he received a total of $507.45. During the time when the mine was idle in this year, deceased was working outside of this employment for another employer as a cement block layer and earned $487.14.

It is conceded that compensation is due and payable to the appellee as sole dependent of deceased, and it is also conceded that such compensation is to be paid weekly for the period of 300 weeks.

The sole question presented for determination is the amount of the weekly compensation to be paid. The case, therefore, involves the construction of section 11 of part 2 of Act. No. 10, heretofore mentioned, which deals exclusively with the matter of "compensation." This section reads as follows:

"SEC. 11. The term 'average weekly wages, as used in this act is defined to be one fifty-second part of the average annual earnings of the employee. If the injured employee has not worked in the employment in which he was working at the time of the accident, whether for the employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he has earned in such employment during the days when so employed. If the injured employee has not worked in such employment during substantially the whole of such immediately preceding year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or a similar employment in the same or a neighboring place, shall have earned in such employment during the days when so employed. In cases where the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such annual earnings shall be taken at such

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sum as, having regard to the previous earnings of the injured employee, and of other employees of the same or most similar class, working in the same or most similar employment, in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee at the time of the accident in the employment in which he was working at such time."

The construction of this section of the statute is for the first time before this court, and our statute, although similar in many respects to other statutes of like import in England and some of the United States, differs quite materially from all of them as to the rules provided for determining the amount of compensation to be paid those entitled thereto under it.

It will therefore be proper to give consideration at the outset to the conditions giving rise to the necessity for such legislation, and also the objects sought to be accomplished and the radical changes brought about by its enactment. Such legislation has undoubtedly been brought about by present industrial conditions which have for years continued to take increased toll from the numbers of those employed, on account of the increased hazards connected with manufacturing, transportation, and kindred industries.

Heretofore if an employee has been injured or killed in any employment in which he was engaged, he, or those representing him or dependent upon him, could recover for such injury or death only when the same could be attributed to the negligence of the employer. Experience has shown that such conditions were unsatisfactory, and results arising from such litigation often worked great injustice to one or both parties. From these conditions has been evolved legislation of this character upon the theory that the industry which occasioned such injuries should, as a part of the cost of production, bear the burden by compensation for the same.

The act in question, like all similar acts, provides for compensation, and not for damages, and in its consideration and construction all of the rules of law and procedure, which apply to recover damages for negligently causing injury or death,

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are in these cases no longer applicable, and there is substituted a new code of procedure fixed and determined by the act in question. This legislation, then, is a new departure and creates a new liability, resting upon one class in favor of another, without reference to any negligent conduct of the class upon which the burden is cast. In other words, this legislation is wholly in derogation of the common law. It is legislation which awards compensation for the accidental industrial injuries to be added to the cost of production.

This statute, being in derogation of the common law, should be strictly construed, and that fundamental principle must be applied, although it is remedial and provides a remedy against a person who otherwise would not be liable. This act is entitled:

"An act to promote the welfare of the people of this State, relating to the liability of employers for injuries or death sustained by their employees, providing compensation for the accidental injury to or death of employees and methods for the payment of the same, establishing an industrial accident board, defining its powers, etc."

This entitling would indicate that this legislation was justified on the ground that it is a proper exercise of the police power of the State. In its construction we enter a new field, to consider only the question of compensation, and to turn absolutely away from the idea of damages.

The compensation provided for is based upon average weekly wages of the injured or deceased party, 50 per cent. of which is to be paid weekly to him or his dependents, for various periods of time, according to the nature of the injury or the length of the disability. The average weekly wages of the employee must always be determined by dividing his average annual earnings by 52.

By section 11 of part 2 of this act the legislature specifically provided the manner in which the average annual earnings of each employee should be determined by making four classifications, under one of which every case to be considered and determined under this statute must fall. Attention will now

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be given to these classifications, quoting and construing them in the order in which they appear in this section:

First. "The term 'average weekly wages' as used in this act is defined to be one fifty-second part of the average annual earnings of the employee."

While this sentence is in fact a definition, it is also a classification. There is practically no disagreement between the attorneys for the parties upon this matter. It is admitted that, where an employee has worked in the employment in which he was injured for practically the whole year immediately preceding his injury, his average annual earnings are fixed and known, and to determine by this definition his average weekly wages requires but a simple mathematical computation. That this was the legislative intent clearly appears from the initial clauses of the second and third classifications which immediately follow, both of which treat cases where the injured employee has not so worked.

Second. "If the injured employee has not worked in the employment in which he was working at the time of the accident, whether for the employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he has earned in such employment during the days when so employed."

This class is intended to include those cases where an employee who has not worked in the employment in which he was engaged at the time of his injury, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, where his daily wage or salary earned is fixed and known. In such case his average annual earnings will be 300 times such average daily wage or salary earned in such employment during the days when so employed.

Third. "If the injured employee has not worked in such employment during substantially the whole of such immediately preceding year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class

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working substantially the whole of such immediately preceding year in the same or a similar employment in the same or a neighboring place, shall have earned in such employment during the days when so employed."

This class is also intended to include those cases where an employee has not worked in the employment in which he was engaged at the time of his injury during substantially the whole of such year immediately preceding; there being, by reason of the limited term of service, no data from which his average annual earnings can be determined. In such case such earnings shall consist of 300 times the average daily wage or salary which an employee of the same class, working substantially the whole of the preceding year, in the same or similar employment, in the same or a neighboring place, shall have earned in such employment during the days when so employed.

Fourth. "In cases where the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such annual earnings shall be taken at such sum as, having regard to the previous earnings of the injured employee, and of other employees of the same or most similar class, working in the same or most similar employment, in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee at the time of the accident in the employment in which he was working at such time."

This classification includes all cases—

"Where the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied."

This is the sole test fixed by the legislature to determine whether or not a case comes within this class.

The question in the instant case for the court, upon the facts presented by this record, is to determine under the provisions of which of the four classifications of this statute the average annual earnings of this employee must be ascertained. It is clear that the first, second, and third classes of cases relate to employments which continue during substantially the entire

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calendar year. About the first there is no question. The same initial language used in the second and third classifications indicates that the legislature still had in mind employments at which employees worked substantially the whole of the year immediately preceding an injury. The employment in which the injured employee in the instant case was engaged at the time of his injury was not an employment of that character. It was not an employment in an industry which continued operations during substantially the entire year. The record shows that this is the case, not only in the Saginaw valley district, but everywhere in the coal mining industry. It also shows that the miners were paid according to the number of tons of coal mined by them, and that, under the system of operations, the miners worked on numbers; that frequently two or more miners get out coal and send it up to the surface upon one number; that the man to whom the number belonged would receive the pay for the entire output, and the miners would divide it among themselves. It also appears that the coal mines in the Saginaw valley district worked on an average of 211 days in each year. How will it be possible, in fixing the average annual wages of deceased, to adapt these facts to the rules established by the legislature in classes 1, 2 or 3?

In our opinion the "methods of arriving at the average annual earnings of the injured employee" set forth in these classes "cannot reasonably and fairly be applied." We must therefore conclude that it comes within the fourth classification, where such average annual earnings must be determined to be such sum as, *"having regard to the previous earnings of the injured employee,* and of other employees of the same or most similar class, working in the same or a most similar employment, in the same or neighboring locality, shall reasonably represent *the annual earning capacity* of the injured employee at the time of the accident *in the employment in which he was working at such time."* Applying this rule to the undisputed facts in the instant case, we find that he was paid by his employer, in this employment in which he was engaged during the time the mine was operated the preceding year, the

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sum of $507.45; that the average time in which the coal mining industry operated in that district was 211 days. It is clear, from the manner in which the men worked on numbers in this employment, that the above sum but approximately represents his entire earnings. The terms of this fourth classification indicate that the amount of compensation in the cases which come within it can only be approximated. We have already intimated that the legislative intent in enacting this legislation was to place the burden of compensation for losses caused by industrial injuries and deaths upon the several industries as part of the cost of production, in this manner to be borne by the public generally.

The foregoing consideration of these four classifications shows that the term "average annual earnings" of the injured employee, as used in this act, means his average annual earnings in the employment in which he was engaged at the time of his injury. This appears so clearly and emphatically that it is impossible to arrive at any other conclusion and preserve what appears to have been the legislative intent to exclude other earnings in different or concurrent employments, and thus be able to distribute the burden of compensation to each of the several industries where in the injuries and deaths may occur.

In making these classifications which we have been considering, the known and recognized incidents of industrial employments were taken into consideration. The first three relate to employments wherein operations are carried on for substantially the entire year, and may be said to include the large majority of industrial employments in the State. That there were well-known industrial employments within this jurisdiction which were not so operated must also have been within the knowledge of the legislative body. That such employments were recognized and provided for is apparent from the terms and provisions of the fourth classification. If this conclusion is not correct, we must hold that the legislature has omitted a large class of employees from the benefits of

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this statute. Such a construction will never be given, where another and a reasonable construction can be adopted.

Act No. 10, under consideration, both by its title and by the provisions which it contains, indicates that it was general legislation intended to apply to all employees and all industrial employments within this State, and to provide compensation to all such employees for accidental injuries or deaths resulting therefrom. It is apparent, then, that the legislation was intended to make such provision, and that section 11 of part 2 of this act was intended to apply to all cases of accidental injuries or deaths occurring in such employments.

In our opinion the legislature by this statute did in fact make provision which applied to all cases of such injuries and deaths occurring in all employments, and that, in making such provision, they included the known and recognized incident of the employment of coal mining and other employments that such employments were not carried on during the entire year. Therefore, in determining the compensation to employees injured in such employments and in arriving at a fair and reasonable basis therefor, the computation must be made under the provisions of the fourth classification of this statute, and the amount of the average annual earnings of the injured employee ascertained as near as possible.

To charge this employment with compensation for injuries to its employees on the same basis as employments which operate during substantially 300 days in the year would be an apparent injustice, as such compensation would be based on the theory of impossible earnings by the employee in that employment which operated upon the average a trifle over two-thirds of a working year. This was recognized and provided for by the legislature by omitting from the fourth classification any requirement relative to the average daily wage or salary of an injured employee. This construction, in principle, appears to be supported by the English cases involving questions of like character. *Kelly* v. *Spinning Co., Ltd.*, 43 Ir. L. T. J. 81; *Bailey* v. *Kenworthy*, 98 L. T. 333, 334; *Carter* v.

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John Lang & Sons, 16 Sc. L. T. 345-348; *Anslow* v. *Colliery Co.,* 100 L. T. 786.

In the record is an exhibit showing the annual earnings paid by appellant to the deceased from 1904 to 1912, inclusive, amounting to $5,175.21. From this table we find that the average annual earnings paid to him during that period were $575.02, which we will take as a basis for the computation of the compensation to which the claimant is entitled. Having determined his average annual earnings, there remains nothing further to do, except to determine the average weekly wages, by dividing this sum by 52, the result of which is $11.06, as such average weekly wages. One-half of this amount, being $5.53, would be the amount to be paid weekly to the claimant for a term not exceeding 300 weeks.

The conclusion of law, therefore, of the industrial accident board, in determining that the average weekly wages of deceased should be computed under the second classification of section 11 of part 2 of this act, was erroneous. Its order in affirming the award made in this cause by the arbitration committee therein is therefrom reversed and set aside; and this court, in cases under this act brought to this court for review, being authorized by section 12 of part 3 of said act "to make such orders in respect thereto as justice may require," does order and determine that said order of the industrial accident board be reversed and set aside, and an order entered by said board in said cause in accordance with the foregoing opinion, but without costs.

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LYDA RAYNER,
Applicant,
vs.
SLIGH FURNITURE COMPANY,
Respondent.

FACTORY RULES—ACQUIESCENCE BY EMPLOYER IN INFRACTION OF RULES. Applicant's decedent was employed in the factory of respondent. It was customary for the respondent to announce the noon hour by blowing a whistle. The employes were required to proceed to the end of the room in which they worked and punch a time clock before leaving for dinner. On the day of his injury decedent started on a run from his bench toward the time clock, which was located about 150 feet away, and collided with a fellow workman, receiving injuries which resulted in his death. There was a rule forbidding the men running to punch the clock, but respondent's foreman testified that it was not strictly enforced.

HELD: 1. That the mere fact that such a rule was made is not controlling when its general violation is acquiesced in by the employer.

2. The infraction of this rule by decedent was not such intentional and wilful misconduct as to bar recovery, in view of the fact that it was the general custom of decedent's fellow employes and was tactitly permitted by respondent's foreman.

Appeal of Sligh Furniture Company from the decision of an arbitration committee, awarding compensation to Lyda Rayner for the death of her husband. Affirmed.

Opinion by the Board:

On November 5, 1912, Adelbert Rayner, the applicant's husband, was injured in respondent's factory in the city of Grand Rapids. Mr. Rayner was fifty-nine years of age, was of light build, somewhat active, and on the day of his injury was working in the cabinet department on the third floor of respond-

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ent's factory. About 100 carvers and cabinet makers were employed in that room, and on the blowing of the noon whistle each was required to proceed to the end of the room and punch the time clock before leaving for dinner. The distance from the bench where Mr. Rayner was working to the time clock was about 150 feet, and when the noon whistle blew on the day of the injury, he started on a run from his bench towards the time clock to punch it. After proceeding about 30 feet towards the clock he collided with one Martin De Vos, a fellow-employe, fracturing or injuring one or more of his ribs. Rayner continued to work after the injury, evidently thinking that it was not serious and no doctor treated him for four or five days. No notice was given the defendant of the injury until after Mr. Rayner's death, which occurred on December 26. It is claimed on the part of the applicant that the injury to Mr. Rayner's side and ribs punctured or affected the pleura of the lungs and that from the inflammation or irritation that followed the lungs became affected, resulting in Mr. Rayner's death, and that the original injury was the cause of such death. The respondent contends that Mr. Rayner's death was not the result of the accident, that it did not arise out of and in the course of his employment, and that he was guilty of intentional and wilful misconduct.

The Board has carefully examined all of the evidence and has reached the conclusion that the accident above referred to was the proximate cause of Mr. Rayner's death. It is a regrettable feature of the case that notice of the injury was not seasonably given the respondent by Mr. Rayner, but under the circumstances shown in the evidence this failure to give notice would not be a bar to the applicant's claim.

It is clear that Mr. Rayner was acting in the course of his employment at the time he received the injury. In fact there is no serious dispute on this point. He was required to proceed from his workbench to the time clock, and to punch the time clock before leaving the room in which he was working. This was a duty imposed upon him by the employer and he was in the act of performing that duty at the time he received

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the injury, having proceeded part way from his bench to the clock. We are also of the opinion that the injury rose out of his employment, within the meaning of Act No. 10, Public Acts of 1912. The evidence fairly shows that it was customary for the men to run for the time clock when the whistle blew and crowding and collisions resulted and were likely to result in going to and punching the clock and leaving the room on such occasions. The evidence on this point is more fully referred to in the following paragraph of this opinion:

Did the action of Mr. Rayner in running toward the time clock amount to intentional and wilful misconduct within the meaning of the compensation law? The evidence shows that respondent had forbidden such running by rule, but it was also shown that such rule was not enforced. Frank Lardie, who was Mr. Rayner's immediate foreman, testified that he had notified the men several times not to run to the clock, and that only a part of the men did the running when the whistle blew (R. 35), acknowledging that the rule against running is not enforced. Charles Hicks, foreman of the carvers in the room in which Rayner worked, testified that there was crowding and jamming at times in going to the clock; that the rule not to run to the clock was made about a year before the accident, but witness would not say that the rule was so enforced as to stop the running (R. 47). Martin De Vos testified that people used to run to the clock most every day and that was the case right up to the time Mr. Rayner was hurt (R. 47), and Mr. Landegand, another foreman of respondent, testified that the biggest share of the men ran to the clock each day, notwithstanding the rule; "they insist on running. I have discharged men because they run, but it did no good, the rest of them keep it up just the same. You cant' let them all go. It has been the practice there to run."

The mere fact that a rule was made forbidding running to the time clock is not controlling when its general violation is acquiesced in by the employer. The action of Mr. Rayner in running to the clock did not differ materially from the action of a considerable number of other employes, and such

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conduct was acquisced in and tactitly permitted by respondent's foremen. It did not amount to intentional and wilful misconduct. The decision of the committee on arbitration is affirmed.

SUPREME COURT.

LIDA RAYNER,
Applicant and Appellee,
vs.
SLIGH FURNITURE COMPANY,
Respondent and Appellant.

1. APPEAL AND ERROR—CERTIORARI—INDUSTRIAL ACCIDENT BOARD—CONTRIBUTORY NEGLIGENCE—PERSONAL INJURIES—MASTER AND SERVANT.
   In reviewing a decision of the industrial accident board, awarding compensation for the accidental injury and resulting death of an employee, a finding that the injury did not arise from the intentional and wilful misconduct of the deceased will not be reviewed, if there was evidence to support it. Act No. 10, Extra Session 1912, § 12, pt. 3, (2 How. Stat. [2d Ed.] § 3980).

2. MASTER AND SERVANT—INDUSTRIAL ACCIDENT BOARD—COURSE OF EMPLOYMENT.
   Injuries resulting in the death of an employee, in the factory of defendant, from colliding with another servant while the decedent was running to punch the time clock, a duty imposed by the master, was an industrial accident, within the meaning of Act No. 10, Extra Session 1912 (2 How. Stat. [2d Ed.] § 3939 *et seq.*). McAlvay, C. J., dissenting.

3. SAME—PROXIMATE CAUSE.
   If not the proximate cause of decedent's injuries, the performance of such duty so contributed to the accident as to constitute a concurring cause.

Certiorari to the industrial accident board by the Sligh Furniture Company to review an order awarding compensation to Lida Rayner for the accidental death of her husband.

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Adelbert Rayner. Submitted January 8, 1914. Affirmed April 7, 1914.

Francis D. Campau (*William A. Mulhern*, of counsel), for appellant.

Norris McPherson & Harrington, for appellee.

KUHN, J. This case is brought here by certiorari to the industrial accident board. Adelbert Rayner, the applicant's husband, was injured while in respondent's factory in the city of Grand Rapids. About 100 carvers and cabinet workers were employed on the third floor of the factory, and, on the blowing of the noon whistle, each workman was required to proceed to the end of the room and punch the time clock before leaving for dinner. Mr. Rayner, who was working on this floor, about 150 feet from the time clock, on November 5, 1912, when the whistle blew at noon, started on a run from his bench to the clock to punch it. After proceeding about 30 feet, he collided with Martin De Vos, a fellow employee, whom he could not see because of drawers which were piled up on the floor. This resulted in Rayner fracturing or injuring one of more of his ribs. The injury to his side and ribs affected the pleura of his lungs, and from the inflammation or irritation which followed the lungs became affected, resulting in Mr. Rayner's death.

There had been no general notice printed or posted of a rule against running to the time clock, but, about a year previous to the accident, Rayner had been told by his foreman, Hicks, not to run to the clock. There was testimony that the rule against running had not been enforced, and no employee had been discharged because of doing so. An award to claimant, who was left as his dependent, was made by a committee on arbitration, and upon review was affirmed by the industrial accident board.

It is the contention of the respondent and appellant that the facts indicate that the accident and the resulting injury arose out of an act independent of the employment, in direct

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violation of a rule of the company, and solely for his own pleasure or convenience. With reference to the rule, the commission made a finding that such a rule had not been enforced and its general violation had been acquiesced in by the employer. There being evidence to support this finding of fact, by the terms of the act (part 3 §12, Act No. 10, Public Acts, Extra Session 1912) (2 How. Stat. [2d Ed.] § 3939 *et seq.*) it becomes conclusive, and as a result eliminates the consideration of the question as to whether the injury arose by reason of the intentional and wilful misconduct of Rayner. *Rumboll* v. *Colliery Co.*, 80 L. T. 42, 1 W. C. C. 28.

At the time of the accident, Rayner was in the performance of a duty imposed upon him by his employer. When the noon whistle blew, it was obligatory upon him, before leaving the place of his employment, to punch the time clock. The performance of this duty, if not the proximate cause, was a concurring cause of his injury. In *Fitzgerald* v. *Clarke & Son* (1908) 99 L. T. 101, 1. B. W. C. C. 197, Buckley, L. J., stated the rule as follows:

> "The words 'out of and in the course of the employment' are used conjunctively, not disjunctively; and upon ordinary principles of construction are not to be read as meaning 'out of,' that is to say, 'in the course of.' The former words must mean something different from the latter words. The workman must satisfy both the one and the other. The words 'out of' point, I think to the origin or cause of the accident; the words 'in the course of' to the time, place and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words 'out of' involves, I think, the idea that the accident is in some sense due to the employment."

We are well satisfied that the accident was an industrial accident within the meaning of the compensation act, and arose "out of and in the course of his employment." *Whitehead* v. *Reader*, 2 K. B. 48 (1901).

The judgment and decision of the industrial accident board is affirmed, with costs against appellant.

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BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred with KUHN, J.

MCALVAY, C. J. I do not think that this was an industrial accident within the statute.

SUPREME COURT.

ESTATE OF P. D. BECKWITH
and
FIDELITY & CASUALTY COMPANY,
Applicants and Appellants,
vs.
ALDEN SPOONER,
Respondent and Appellee.

1. WORKMEN'S COMPENSATION—PETITION TO TERMINATE PAYMENTS—RES JUDICATA.

On the hearing of an employer's petition to the Industrial Accident Board to terminate compensation awarded to an injured servant by the contract of employer approved by the accident board, the essential elements leading up to the award are to be taken as concluded and are not open to review. The physical condition of the injured employee is the subject of inquiry and is legally open to adjudication. Act No. 10, Extra Session 1912 (2 How. Stat. [2d Ed.] § 3939 *et seq.*).

2. SAME—CONTRACTS—RES JUDICATA.

An employer's agreement filed with and approved by the accident board, granting compensation to a servant for injuries sustained in the course of his employment, is a substitute for, and under the statute is the legal equivalent of, a final award of the Board, and has equal force and standing, when, to enforce recovery, it becomes necessary to put them in judgment in the circuit court.

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3 APPEAL AND ERROR—CERTIORARI—WORKMENS COMPENSATION.
Upon review of the findings and determination of the Industrial Accident Board by writ of certiorari, the findings of fact are to be taken as final and conclusive if there is evidence to support them, in the absence of fraud.

4. SAME—INDUSTRIAL ACCIDENT BOARD—REVIEW.
Where an employee received compensation from his employer by a written agreement approved by the accident board, after a full opportunity to investigate the facts, and no fraud was alleged, the agreement was conclusive as to a subsequent claim of the employer that the loss of the eye, afterward, by a cataract, was not produced by the injury, which the medical testimony tended to show might have resulted from the injury, the employer claiming that the cataract resulted from a cataract on the other eye that had been removed by an operation, or was caused by senility, and that the injury did not cause the loss of sight.

5. SAME.
Where different inferences may be drawn from the testimony before the Industrial Accident Board, and inferences which are favorable to their finding that a petition to terminate compensation should not be granted are deducible from the record, the court on certiorari will not disturb the result.

Certiorari to the Industrial Accident Board; submitted November 13, 1913. Decided December 18, 1914.

The estate of P. D. Beckwith, a corporation, and Fidelity & Casualty Company of New York petitioned the Industrial Accident Board for an order terminating the right to compensation of Alden Spooner, under an agreement with the petitioner, and from an order denying the petition they appeal. Affirmed.

Charles H. Ruttle, for appellants.
Persons, Shields & Silsbee, for appellee.

STEERE, J. Plaintiff, and appellants herein seek, by certiorari review and reversal of certain "Proceedings and Decisions and Awards," had and made before and by the Industrial Accident Board of this state, which culminated in the following final order:

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Alden Spooner,
Claimant,
v.
"Estate of P. D. Beckwith and
Fidelity & Casualty Company of New York,
Respondents.

"This matter having come on to be heard upon the petition of the respondent filed herein, praying for relief and to stop compensation for reasons set forth in said petition, and, after full examination of the proofs, upon said petition, and hearing argument thereon, and due consideration thereon having been had, and it appearing to the Board that the facts alleged in said petition as reason for stopping compensation are not sustained by the proofs, it is ordered and adjudged that the said petition be, and the same is hereby dismissed."

It appears, undisputed, that said Alden Spooner was regularly employed as a molder by the above corporation, known as the "Estate of P. D. Beckwith," of Dowagiac, Mich., which, as an employer of labor, had, with approval of the Industrial Accident Board, elected to come under the provisions of Act No. 10, Public Acts of 1912, extra sesion, (2 How. Stat. [2d Ed.] § 3939, *et seq.*) While regularly engaged in its employment as a molder Spooner suffered an accident resulting in an injury to his right eye, described by his employer, in its report made under the requirements of section 16, part 3, of said act, as follows:

"Molten iron splashed into right eye, right eye burned."

Section 5 of part 3 of said act provides:

"If the employer, or the insurance company carrying such risk, or Commissioner of Insurance, as the case may be, and the injured employe reach an agreement in regard to compensation under this act, a memorandum of such agreement shall be filed with the Industrial Accident Board, and, if approved by it, shall be deemed final and binding upon the parties thereto. Such agreement shall be approved by said Board only when the terms conform to the provisions of this act."

Pursuant to the provisions of this section the following was filed with the Industrial Accident Board, on November 14, 1913:

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"AGREEMENT IN REGARD TO COMPENSATION.

"We, Al Spooner, residing at city or town of Dowagiac, Mich., and Fidelity & Casualty Co., of N. Y., have reached an agreeement in regard to compensation for the injury sustained by said employe while in the employ of Estate of P. D. Beckwith, Inc., Dowagiac.

"The time, including hour and date of accident, the place where it occurred, the nature and cause of injury and other cause or ground of claim, are as follows:

"Mr. Spooner was injured Oct. 22, 1913, about 4:30 p. m. Molten iron splashed into right eye, causing bad burn in corner of eye.

"The terms of the agreement follow: $17.60 wages earned; $8.80 compensation agreed upon.

"Al Spooner,
"Fidelity & Casualty Co., of N. Y.,
"By Leo A. Donahoe.

"Witness: Wm. Hurst.
"E. A. Miecham.

"Dated at Dowagiac, Mich., this 12th day of November, 1913."

This agreement was approved by the Industrial Accident Board on November 14, 1913, and thereafter compensation was paid accordingly from October 22, 1913, to January 14, 1914.

On January 21, 1914, appellants filed with the Industrial Accident Board a petition asking to be relieved from further payments, based upon the following letter or report, addressed to Dr. Jones, the local physician who attended Spooner professionally at the time of his injury, and who had referred him to Dr. Bonine, an eye specialist:

"January 15, 1914.

"Dr. J. H. Jones,
"Dowagiac, Mich.

"*Dear Sir*: I have had Mr. Spooner under my careful scrutiny and find the following condition: Some years ago I operated for cataract on one eye and obtained good results—above the average. The other eye shows signs of the same trouble at this time. That, however, is not strange as it is the rule with senile cataracts if they come on one eye they are quite certain to grow on the other, as you know.

"Therefore there is nothing unexpected about the remaining lens filling in, so can't see where any one could be held responsible for

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present conditions, as no other pathological condition of the orbit is in evidence.

(Signed) F. N. Bonine, M. D."

Upon the hearing of said petition depositions of Drs. Jones and Bonine were introduced in evidence. The board thereafter made the following:

"FINDINGS OF FACT.

"(1.) The respondent, Alden Spooner, was employed in the plant of the Estate of P. D. Beckwith, Inc., as a molder, and had worked there for several years in that capacity. He was 65 years old and at the time of the injury was receiving wages of $17.60 per week.

"(2.) That on October 22, 1913, respondent while attending to his duties as a molder, received an injury to his right eye by having hot sand and other substances splashed into the same, producing an inflammation necessitating immediate medical attention and causing disability to do work.

"(3.) That in 1905 respondent had a cataract removed from his left eye by Dr. F. N. Bonine and that such operation was successful and the result thereof above the average.

"(4.) That respondent's right eye, being the one injured in October, 1913, has now developed a cataract, which is so far advanced that he can discern light but has practically no vision. His left eye, operated on in 1905, is of little use, and he is in a condition of total disability on account of the condition of his said eyes.

"(5) That the claim of petitioners, that the present condition of respondent's right eye is due not to the injury thereof on October 22, 1913, but that such condition is due to senile cataract, is not sustained by the evidence.

"(6.) That the present condition of respondent's right eye and his resulting disability is due to the injury received by him October 22, 1913.

"(7.) That all of the proposed findings of fact of petitioners, not included in these findings are refused."

Against the action of the Industrial Accident Board in this matter, appellants urge two major grounds of reversal: *First* that the controlling findings of fact are unwarranted and unsupported by evidence; and *second*, "insufficiency of proceedings." In explanation of the latter it is stated that not the legality, but the sufficiency, of the proceedings is questioned,

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in the particular that, although appellants in support of their petition produced proof which established—

"Spooner was suffering with a senile cataract, and that his disability was not a result of his injury of October 22, 1913, yet the Industrial Accident Board refused to accept the unchallenged testimony of the physicians and without any further evidence whatsoever, as to Spooner's precise condition, with respect to his eyes, entered an order denying appellants' petition, which order is so vague, uncertain and indefinite that it may work irreparable damage to appellants. * * *" and "that appellee has never produced any proof that he sustained an injury while in the employ of the Estate of P. D. Beckwith, Inc.; that there is no evidence that his disability or impairment of eyesight were a result of his accident of October 22, 1913, as well as that it did not exist for some time prior to the date mentioned; that at no time has any admissible evidence been offered relative to his present condition, whether the sight of the left eye operated on in 1905 is good, or in any degree impaired, and if impaired to what extent, nor is there any testimony as to the exact condition of the right eye, in which grains of sand lodged on October 22, 1913, and whether the sight in that eye is impaired, permanently or partially, or to what degree."

In the latter particular appellants disregard the significance of the report and agreement as to compensation filed by them, which eliminate the various statutory steps of arbitration now urged as imperative. The agreement, filed with and approved by the board, is a substitute for, and, under the statute, the legal equivalent of, an arbitral award. They have equal force and like standing when, to enforce recovery it becomes necessary to put them in judgment in the Circuit court for the county where the accident occurred (section 13, part 3 of said act). The power of the board to act upon a petition such as appellants presented in this case is found in the following section (14), which authorizes it to review any weekly payment at the request of the employer, insurance company carrying the risk, commissiner of insurance, or employe, "and on such review it may be ended, diminished or increased, subject to the maximum and minimum amounts above provided, if the board finds that the facts warrant such action."

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On the hearing of such a petition for review it can be stated as a general rule that the essentials leading up to the award, or its equivalent, are to be taken as *res adjudicata,* except the physical condition of the injured employe, which naturally and legally remains open to inquiry. *Mead* vs. *Lockhart,* 2 B. W. C. C. 398.

We discover no claim in this record that appellants were induced to enter into the agreement regarding compensation by fraudulent misrepresentations of the other party. It is established beyond question by their own representations that Spooner was injured on October 22, 1913, while working as a molder for the Estate of Beckwith by "molten iron splashed into right eye; right eye burned;" that he was treated by Dr. Jones, one of their witnesses, on October 23d, 27th, 30th and 31st. Dr. Jones, a physician in general practice, testified that he found small, black particles of foreign substance in the right eye and inflammation in the conjunctiva, but neither it nor the cornea were abrased or penetrated; that the inflammation was slow in disappearing and continued over several weeks—four or five weeks before it disappeared—that he thought it a case which needed the service of a specialist, and referred the patient to Dr. Bonine. The only reference in Dr. Jones' testimony to a cataract is found in this answer to a question on cross-examination, whether he thought the injury he treated would cause, or help cause a cataract.

"A. Well, upon technical points, the substance of special matters bearing upon the interior conditions of the eye, I don't make a special work of it. I would state, however, severe injuries to the eye do cause cataracts. I do not make a practice of treating conditions that involve the interior of the eye, but I refer them to a specialist."

We see no force in the contention that at the time of settlement Spooner was not suffering from an injury which arose out of and in the course of his employment. The manner of the accident and condition of the eye were then open to appellants' investigation, and unquestioned. After ample time and opportunity to learn fully of the accident and history of

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the case from the physician in charge, the injured employe and all other sources, the agreement was made on November 12 following. We find no testimony tending in any manner to show that prior to the accident there was any cataract or impairment of vision in, or trouble with, this right eye. Thereafter its vision was inpaired, and a state of inflammation, slow in healing, led the local physicians to refer the patient to a specialist, who, on December 20, 1913, discovered an immature, developing cataract, the existence of which was undisputed at the time of hearing.

Dr. Bonine testified that when he examined the injured eye, on December 20, 1913, "there was irritation of the eye that could be attributed to an inflammatory state of traumatism producing it, or hardness of the eye ball would cause a largeness of the vessels of the eye, would give it that appearance;" that he found a pretty well-advanced cataract on that eye, but could not tell how long it had been forming, because he had not seen Spooner, except casually, since he operated on his left eye for a cataract eight years previous, in 1905. In explaining the nature of cataracts, witness stated that there were three distinct ways in which they are formed, the simplest being a traumatic cataract, caused from an injury, the second a senile cataract, caused by an interference with the nourishment of the lens through diseases of the inner tissues, and the third hereditary or resulting from hereditary tendency; that a traumatic cataract would usually come in from one to three or four weeks after an injury, or sometimes instantly if the lens was pierced so that the aqueous humor came in contact with it; asked if this was a traumatic or senile cataract he answered:

"A senile. * * * It is the rule that when a cataract comes on one eye the tendency is to form on the other; not necessarily, but it is the rule, and not concurrent. * * *

"Q. Could you determine, in saying, whether this was a senile or traumatic cataract?

"A. The stage of inflammation had gone on until it would be a difficult matter to do that. The only indication had was irritation or flushed eyeball and that I spoke of at first; that was traumatism.

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"Q. Has the cataract grown since you first saw Mr. Spooner in December?

"A. From the first to the last the vision has decreased decidedly.

* * *

"Q. If this was a traumatic cataract, would it have been probably fully developed by December 20th, in 8 weeks?

"A. Depending upon the severity of the injury. If the injury was slight, it would develop slowly."

Being asked on cross-examination,

"In your opinion, doctor, is there any connection between the cataract on the left eye and on the right?"

He answered:

"The only connection established would be the rule of the formation of cataracts, as over 80 per cent of cataracts that form first in one eye would later form on the other, 20 per cent of one eye will be cataracts, and the other eye not at all, so that is the only relation one eye could have to the other."

The doctor nowhere testifies that the cataract removed by him from the left eye over eight years before was senile, but such possibly may be inferred from his testimony, especially when considered in connection with his letter to Dr. Jones.

Section 12, part 3 of said Act No. 10, under which these proceedings are had, empowers this court to review only questions of law; all questions of fact determined by the Board from competent evidence being conclusive, in the absence of fraud. It must be conceded, as urged by appellants, that the record discloses no testimony, competent or otherwise, to sustain the finding:

"His left eye, operated on in 1905, is of little use, and he is in a condition of total disability on account of the condition of his said eyes."

This finding, however, tends only to confuse, and must be eliminated from consideration, not only because it has no evidential support in the case, but no claim was ever made for injury to the left eye, and its condition is not in issue. With it eliminated there is sustaining evidence for the re-

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maining findings of fact essential to support the order sought to be reversed.

The controlling issue raised before the Board by appellant's petition for review was whether they had by their evidence conclusively established that the cataract which appeared in claimant's right eye after the injury was senile, and therefore not connected with, or attributable to, such injury. To sustain appellant's contention here this court must, therefore be able to say, from the whole record, as a conclusion of law, that the Industrial Accident Board must find, not could find, as a conclusion of fact, that the cataract in the injured right eye is senile and not traumatic, and that Spooner was not, at the time of hearing said petition, under any incapacity attributable to the accident, and resulting injury to that eye, on October 22, 1913.

We conclude that upon such issue different inferences of fact could legitimately be drawn from what the record discloses and, in such case, where the Board does not find "that the facts warrant such action" as may be requested under section 14, part 3, of the act creating said Board, the court cannot disturb its findings and orders thereon, made while acting within the authority there conferred.

The order complained of is therefore affirmed.

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SUPREME COURT.

WILLIAM McCOY,
Applicant and Appellee,
vs.
MICHIGAN SCREW COMPANY,
Respondent and Appellant.

1. MASTER AND SERVANT—INDUSTRIAL ACCIDENT BOARD—PERSONAL INJURIES—PROXIMATE CAUSE.
Where an employee's eye received an injury from pieces of steel flying from a lathe that he was operating and the eye became infected with gonorrhea with which the employee was afflicted, the loss of his eye, resulting from the disease, did not arise out of and in the course of his employment under the workmen's compensation law, Act No. 10, Special Session 1912 (2 How. Stat. [2d Ed.] § 3939 *et seq.*).

2. SAME—EVIDENCE—BURDEN OF PROOF.
The burden of furnishing evidence from which the inference can be legitimately drawn that the injury arose out of and in the course of his employment rests upon the claimant.

Certiorari by the Michigan Screw Company to review an award of the industrial accident board to William McCoy, claimant. Submitted January 23, 1914. Reversed June 1, 1914.

Stevens T. Mason, for appellant.
Edmund C. Shields, for appellee.

KUHN, J. The claimant, William McCoy, was employed by the contestant and appellant as an operator on a lathe machine. On February 1, 1913, several small pieces of steel from the machine on which he was working lodged in his eye. This, it is claimed, caused an irritation and caused him to rub his eye. At the time, claimant was being treated by Dr. A. M. Campbell for gonorrhea. On February 7th he went to Dr. Cochrane, who removed four pieces of steel from the eye. The

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next day the doctor removed another piece of steel and discovered that the eye had become infected with gonorrhea. He was then sent to a hospital and subsequently lost the sight of the eye. The industrial accident board affirmed an award made claimant by an arbitration committee of $6.49 per week for 100 weeks.

It is the claim of contestant and appellant that the loss of the eye was not the result of a personal injury arising out of and in the course of claimant's employment, but was the direct result of a disease unconnected in any way with his employment. At the hearing before the industrial accident board, four physicians were sworn, who testified as to the effect upon the eye of gonorrheal infection.

Claimant contends that the germs would not have entered the eye had not the steel caused "(a) an inclination to rub—the inciting cause—(b) inflamed condition which made the eye susceptible to the entry of the germs, as in the case of blood poison and erysipelas."

A careful reading of the testimony of the physicians shows that the infection can easily be caused to a normal eye by rubbing the eye with a hand infected with the gonorrheal germ. Dr. Bret Nottingham testified:

"Mr. Mason: And will you say as an expert how gonorrhea can be communicated to the eye? Is it by germ or otherwise?

"A. Yes; it is a contagious disease of course, produced by this germ, and a person, in caring for themselves as they have to, get some of this pus on their finger containing the germs, and of course, the eye being irritable, would rub the eye with the finger containing this pus.

"Mr. Mason: No doubt that infection of the eye was caused by the entering of gonorrhea germs. Could that infection occur if there was no injury in the eye?

"A. Yes.

"Mr. Mason: Therefore, if a perfectly normal eye will be rubbed by a hand infected with the germ, it will infect the eye.

"A. It might be very easily infected; a normal eye can be infected in this same manner.

"Mr. Mason: Suppose this boy had not had an injury to his eye,

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and had rubbed his eye; would it be possible that he could have lost his eye?

"A. Yes; the same result might have been obtained."

Dr. Cushman testified:

"Gonorrhea is one of the most common conditions that there is perhaps, and it is an admitted fact, without any argument upon what we are supposed to know, that the gonorrhea germ will attack and penetrate the unaffected covering of the eye. I have heard it said on reasonably good authority that it is perhaps the only germ that will attack an uninjured eye; but the fact of there having been this injury to the eye from the steel, without any question in my mind, has lowered the resistance of the eye, that is, weakened it, and made it less resistant to the infection. With the inflammation, it was much more probable that the eye become affected. Now, if the infection of gonorrhea was easier transmitted to the eye, there would be probably about 50 per cent of us running around blind. That is, gonorrhea is common, and you don't see many blind. I have heard that 90 per cent of the men in a certain town either have or have had gonorrhea and 90 per cent of the men haven't got bad eyes, and probably have been careless about their fingers. The presence of an injury to the eye makes it far more probable that the eye will become diseased."

Dr. Cochrane testified:

"Mr. Mason: Dr. Cochrane, did you examine this William McCoy; on what date?

"A. February 7th.

"Mr. Mason: He came to you for what trouble?

"A. He complained of steel in his eye.

"Mr. Mason: Did you take the foreign bodies?

"A. Yes.

"Mr. Mason: Where were they in the eye?

"A. On the upper lid on the under side.

"Mr. Mason: Were they in a place where they would have been apt to give very serious injury to the eye?

"A. Not serious injury; they would produce irritation.

"Mr. Mason: Does the present loss of the eye result from these cinders having been in or from another cause?

"A. The direct cause is from the gonorrhea infection.

"Mr. Mason: Therefore the loss of the eye is the direct result of disease, and not of accident.

"A. The immediate cause is the disease.

"Mr. Mason: In other words, what we call the resulting cause is the disease.

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"A. The immediate or direct cause.

"Mr. Mason: How did that gonorrhea get into his eye?

"A. Probably from rubbing with his fingers.

"Mr. Mason: He had gonnorrhea before that?

"A. I understand so.

"Mr. Mason: At the time you examined him did he have gonorrhea?

"A. I understand so.

Mr. Reaves: You say, Doctor, that that was the approximate cause of the loss of his eye—the immediate cause—what would you say if he had not have had the steel in his eye?

"A. If he had not had the steel in his eye, he might not have rubbed his eye, at least not as vigorously as he did, and so he might not have infected the eye."

Dr. Campbell testified:

"Mr. Atkins: How much more chance would there be for his losing his eye after having the piece of steel in there, and the inflammation with it, how much more chance would there be to lose the eye?

"A. Just as soon as the infection gets in there I don't think it would make a great deal of difference. You are just as liable to lose the eye as soon as your infection gets there, whether you had anything in there or not. The point is here, your steel would be an inciting cause, and get infection on that account; but, once you get the infection, you are liable to lose the eye one way or the other. The point is here, there is an inciting cause from rubbing the eye; the effect of the steel being there, a man would be more liable to get infection of the eye, but, once your infection is in there, you will lose the eye from the gonorrheal infection. It does not make any difference how it gets in there, you will lose the sight partially or complete."

The burden of furnishing evidence from which the inference can be legitimately drawn that the injury arose "out of and in the course of his employment" rests upon the claimant, *Bryant* v. *Fiscell*, 84 N. J. Law, 72 (86 Atl. 458); 3 Negligence & Compensation Cases Annotated, p. 585. Ruegg on Employers' Liability and Workmen's Compensation p. 343, says:

"If an inference favorable to the applicant can only be arrived at by a guess the applicant fails. The same thing happens where two or more inferences equally consistent with the facts arise from them."

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Boyd on Workmen's Compensation, § 559, says:

"The workman carries the burden of proving that his injury was caused by the accident and where he fails to do so, and where the evidence as to the cause of the injury is equally consistent with an accident, and with no accident, compensation may not be awarded him."

In the instant case it is not reasonable to say that he would not have rubbed his eye if the steel had not lodged there. He might not have rubbed his eye, it is true; but it is just as reasonable to suppose that he might have had occasion to rub his eye without this particular inciting cause. By the medical testimony it conclusively appears that the infection could have taken place if the steel had not been there. It must be said, from this record, that the loss of the eye was directly and immediately due to the infection caused by the gonorrhea, which it cannot be claimed is a risk incident to the employment. We are of the opinion that the facts are not capable of supporting the inference that the injury arose out of and in the course of the employment.

The decision of the industrial accident board is reversed.

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SUPREME COURT.

PHILIP LIMRON,
Claimant and Appellee,
vs.
FRANK M. BLAIR, *et al.*,
Defendants and Appellants.

COMPENSATION FOR INJURIES—INDUSTRIAL ACCIDENT BOARD.

A workman who has lost a leg and sustained other injuries resulting in total disability is entitled, under the workmen's compensation act (Act No. 12, Extra Session 1912, 2 How. Stat. [2d Ed.] § 3939 *et seq.*), to recover the compensation provided for total disability for a period of not over 500 weeks up to a maximum of $4,000: additional compensation cannot be awarded for the loss of the leg.

Certiorari to the industrial accident board by Frank M. Blair and others, receivers of the Pere Marquette Railroad Company, to review an order awarding compensation to Philip Limron for personal injuries. Submitted April 24, 1914. Reversed June 1, 1914.

W. A. Collins, for claimant.

Parker, Shields & Brown (*S. L. Merriam* and *J. C. Bills*, of counsel), for defendants.

OSTRANDER, J. The precise ruling of the industrial accident board, as expressed in its written finding, is:

"The applicant is entitled to receive under the act one-half (½) his average weekly wages during the period of his total disability due to injuries other than the loss of the lower part of his right limb, and at the conclusion of such period of disability is entitled to payment of one-half (½) his wages for 125 weeks for the loss of the lower right limb by amputation as aforesaid, less six weeks' disability incident to such amputation, provided that such weekly payments shall not in any event extend over a greater period than 500 weeks."

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The board found that, from the date of the injury to the time of making the award, the employee had been totally disabled, and that such disability would continue for an indefinite period; that the main cause of disability was an injured shoulder.

The act (Act No. 10, Pub. Acts Extra Session 1912, 2 How. Stat. [2d Ed.] § 3939 *et seq.*), provides that when, as the result of an industrial accident, the incapacity for work is total, the employer shall pay a weekly compensation equal to one-half the average weekly wages for a period not exceeding 500 weeks. This is the longest period of compensatory payments. A period of disability is in certain cases deemed to exist. For the loss of a foot, the period is 125 weeks. For the loss of any two members, as hands, arms, eyes, feet, legs, the period of total disability is deemed to be 500 weeks, unless the weekly payments amount to $4,000 in a shorter period. If one of the results of accident is the loss of a foot, the period of total disability is 125 weeks, although it may be in fact only 6 weeks. The period is not extended because, as a result of the accident, the employee was in fact totally disabled for a period of 125 weeks, or for any shorter period. If he is in fact disabled by the loss of a foot, or otherwise, for a greater period than 125 weeks, compensation continues until disability is removed, or the maximum of compensation is paid. The statute speaks in terms of disability. All of its provisions being considered, it does not mean that compensation must be paid during a period of actual disability and also, if a member is lost, during a period equal to the one during which total disability is deemed to continue. It does not provide a specific indemnity for the loss of a member in addition to compensation for disability. The aim of the statute is to afford compensation if the employee is disabled. When the period of disability ends, compensation ceases.

It follows that the order of the industrial accident board is erroneous and must be and is vacated and set aside.

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SUPREME COURT.

EMMA FITZGERALD,
Claimant and Appellee,
vs.
LOZIER MOTOR COMPANY,
Defendant and Appellant.

1. APPEAL AND ERROR—REVERSAL FOR IMPROPER ADMISSION OF TESTIMONY.
   Under the Workmen's Compensation Act, the decision of Industrial Accident Board need not be reversed for error in the admission of incompetent evidence when another and legal basis for its findings appears in the record.

2. EVIDENCE—REPORT OF FOREMAN.
   Where it was the duty of the foreman of the department in which claimant's husband worked to report all accidents, and, upon learning that decedent had scratched his hand on a manifold, he made an entry to that effect and reported it to the general foreman, in proceedings under the Workmen's Compensation Act for compensation for the servant's death, the foreman's memorandum was admissible in evidence against the employer, establishing a prima facie case supporting the widow's contention that her husband was injured in the course of his employment.

3. SUFFICIENCY OF EVIDENCE.
   Evidence in proceedings before the Industrial Accident Board to recover compensation for death of claimant's husband in the course of his employment by defendant, *held* sufficient to support finding that the injury occurred in the course of deceased's employment and proximately caused his death.

Certiorari to Industrial Accident Board.

Proceedings under the Workmen's Compensation Act by Emma Fitzgerald to obtain compensation for the death of her husband, opposed by the Lozier Motor Company, employer. Compensation was awarded in the sum of $7.21 per week for 300 weeks, and the employer brings certiorari.. Affirmed.

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F. J. Ward, of Detroit, for appellant.
Charles Wagner, of Detroit, for appellee.

KUHN, J. This is a proceeding brought before us by certiorari to the Industrial Accident Board of this State, to review a decision rendered by said Board October 22, 1913, wherein it affirmed an award by a board of arbitration granting the claimant and appellee the sum of $7.21 per week for a period of three hundred weeks.

The record discloses that William J. Fitzgerald, deceased, a machinist about forty-five years of age, went to work in the assembling department of the Lozier Motor Company on or about January 20, 1913. He worked in this department a few days, and then was transferred to the carburetor department, where he continued to work until about February 4, 1913.

Sometime in the last of January, 1913, the wife of the deceased saw a scratch on his hand, at which time the hand was badly swollen and inflamed, and the deceased told her that he received it on the carburetors in the assembly room of the Lozier Company. During the latter part of January the deceased went to see Mr. Whitehead, an employee of the Lozier Motor Company, to have the scratch on his hand dressed. His hand at the time was badly inflamed, and it looked as if it had been infected for at least forty-eight hours, and the deceased received medical attention from Mr. Whitehead.

About the 30th of January Mr. Brown, an employee of the Lozier Motor Company, and the foreman of the department in which the deceased was employed, noticed him at work with a bandage on his thumb. He asked the deceased what was the trouble with his thumb, and the deceased informed him that he had scratched it about a week prior to that date, that is, on January 23. Working on the same bench about six feet from the deceased was a Mr. Anderson, who stated that he did not see nor did he know anything of an accident until the deceased told him he had hurt his hand on the manifold on the day before he had the talk with him.

On the 5th of February the condition of Mr. Fitzgerald's

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hand was such that he was obliged to quit work and was never afterwards able to go back to his work, and continued medical treatments until the day of his death, which was March 8, 1913. The deceased treated with Dr. Hayes until about the 12th of February, at which date he went to the office of Dr. Raymond C. Andries, who continued to treat him until the time of his death. The doctor gave as the cause of his death "Arterio Sclerosis and Myocarditis." Myocarditis the doctor explained to mean inflammation of the heart muscle, and testified it might be caused by a toxic infection, and that such an infection would tend to lower bodily resistance to other disease. He also testified that when he first saw the deceased it was apparent that he had an infection, and that the condition of the hand showed that there had been an entrance of micro-organisms into it in way from some cause.

A nurse, who stated that she had had some experience in the treatment of cases of blood-poisoning, testified as to the condition of the deceased on the day before and up to the time of his death, and stated that the discoloration in spots on his body, in her opinion, indicated symptoms of blood-poisoning, and that she also saw the wound on the hand.

The assignments of error relied upon by appellant are as follows:

That the Industrial Accident Board erred:

1st. In holding that said William J. Fitzgerald, deceased, received a personal injury arising out of and in the course of his employment while he was employed by your petitioner.

2nd. In holding that said William J. Fitzgerald, deceased, died as the result of a personal injury arising out of and in the course of his employment.

3rd. In holding that a personal injury arising out of and in the course of his employment was the proximate cause of the death of the deceased, William J. Fitzgerald.

4th. In holding that the death of said William J. Fitzgerald was not the result of a disease unconnected in any way with his employment with your petitioner.

5th. In holding that the death of said William J. Fitzgerald was the result of a personal injury sustained on or about January 23rd, 1913, while in the employ of your petitioner.

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6th. In admitting into evidence and considering as part thereof the evidence of the claimant, Emma Fitzgerald, the witnesses, William Brown and Burns L. Whitehead, as to conversations they had with the deceased, which were not in the presence of your petitioner or any officer thereof and not at the time of the alleged accident.

7th. In admitting as evidence and considering as part thereof the memorandum made by the witness, William Brown, of a conversation had between said William Brown and said deceased, William J. Fitzgerald, in regard to what said William J. Fitzgerald had told him pertaining to said alleged accident and personal injury.

8th. In determining and ordering your petitioner to pay said claimant, Emma Fitzgerald, the sum of Seven and Twenty-one Hundredths Dollars ($7.21) per week for three hundred weeks as compensation because of the death of said William J. Fitzgerald.

It may be noticed that the assignments of error relate principally to three questions: whether the unrestricted admission of hearsay testimony was reversible error, and whether there was any competent evidence in the case on which a finding could be based that the injury complained of arose in the course of the deceased's employment, and whether it can be said that the injury complained of was the proximate cause of the death of the deceased.

It is urged by the appellee that the hearsay rule should not be held to apply to arbitration under the provisions of the Workmen's Compensation Act. This question has quite recently had the consideration of this Court, in the case of Reck v. Wittleberger, 21 D. L. N. 713 (found also in 5th Negligence and Compensation Cases Annotated, p. 917), and the rule against hearsay evidence and its applicability to proceedings under this Act are very fully discussed, and this conclusion is arrived at:

"We do not think, however, that under the language used in our Workmen's Compensation Act the decisions of its administrative board must be in all cases reversed under the rule of presumptive prejudice, because of error in admission of incompetent testimony, when in the absence of fraud, there appears in the record a legal basis for its findings, which are made 'conclusive' by statute when said board acts within the scope of its authority."

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The question then is; was there any competent evidence offered to make a prima facie case in support of the claimant's contention? Mr. Brown who was the foreman in charge of the department of the factory in which the deceased was employed, testified that it was his duty to inquire about all accidents that occurred in the factory, and that he first noticed that Mr. Fitzgerald had sustained an injury on January 30, that after inquiring of Mr. Fitzgerald concerning the nature of the injury he immediately made a memorandum in writing of the information which he obtained, which was offered in evidence, and which read as follows:

"W. J. Fitzgerald, last Thursday afternoon, scratched on manifold, right hand, on top of the thumb joint. January 23rd, 1913."

that he immediately thereafter notified Mr. Anderson, the general foreman of the Lozier Motor Company of the fact of the accident. It appears that it was the duty of the employee, as soon as he was injured, to report his injuries however slight to the foreman of the shop in which he was employed, and that notice of this was given to all the employees by signs posted throughout the shop. It also appears that the Lozier Motor Company made a report of the accident to the Royal Indemnity Company, which report was submitted to counsel during examination before the arbitrators but was not offered in evidence.

It is the contention of counsel that the memorandum made by the Company's foreman is competent proof as an admission on the part of the Company by its agent. On the other hand, it is claimed that the information therein contained is based purely on hearsay, and is inadmissible for that reason. In our opinion, under the circumstances of this case, the momorandum was admissible as an admission. Under the rules it was the duty of the employee to immediately notify the foreman in charge of the particular division of the factory in which he worked of the fact of an injury. It thereupon became the duty of the foreman of the factory to immediately notify his superior and also to refer the employee to another

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foreman who had charge of the "first aid" work in the plant. It clearly appears that Fitzgerald, the deceased, after having received the injury reported to the foreman in charge of the shop in which he was working, and this foreman thereupon perpetuated the information received by him by putting it in writing, and thereupon notified his superior of the fact of the injury. That these steps were taken was further evidenced by the fact that the defendant company notified the indemnity company.

It may be said that admissions of this kind, which are not made upon the party's personal knowledge of the facts, have little probative force, but the weight of such an admission in the trial of an ordinary case, and the circumstances under which it was made, would be for the consideration of the jury. In the proceeding before us, in our opinion, the admission may be considered at least as prima facie evidence that such an accident and injury occurred as reported, and this makes a legal basis for the findings of the board. See 17 Cyc. 814.

Without considering the purely hearsay testimony, which it may be said was erroneously admitted, and considering merely the testimony of the physician and the nurse and the admission of the Company's foreman, we think that there is sufficient to support the inference that the injury arose out of and in the course of the deceased's employment, and was the proximate cause of his death.

We therefore affirm the decision of the Industrial Accident Board.

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SUPREME COURT.

WILLIS M. CLARK,
Claimant and Appellee,
vs.
DAVID S. CLARK
and
UNION CASUALTY INSURANCE COMPANY,
Respondents and Appellants.

INJURIES IN THE COURSE OF EMPLOYMENT—FIGHT KEEPING OFF TRESPASSERS.

The applicant was a carpenter foreman and was in the employ of his brother engaged in erecting a dwelling house. He engaged in a fight with men who were attempting to unload brick on his employer's property, forcing them to desist from so doing. On the following day the men returned with reinforcements and with the evident intention of renewing the fight. In the altercation that ensued, applicant was struck in the eye by a piece of iron thrown by one of the attacking party and severely injured.

HELD: That the injury did not arise out of the employment.

Certiorari to the Industrial Accident Board to review the action of that Board in awarding compensation to Willis M. Clark for injuries received while in the employment of David S. Clark. Reversed.

Frederick J. Ward, of Detroit, for claimant.
Walters & Hicks, of Detroit, for defendants and appellants.

BIRD, J. Claimant was a carpenter foreman in the employ of his brother, David Clark, who was erecting a dwelling on Churchill Avenue, in the City of Detroit. David also owned the adjoining lot upon which he intended to erect a dwelling, and had let the contract to excavate for the cellar. Claimant received instructions from him to permit no building materials

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for other dwellings being erected in the vicinity, to be deposited on the adjoining lot. On March 23rd two men with a wagon load of bricks drove on to the adjoining lot and began unloading them. Claimant advised them that the bricks were not for his employer, and warned them to desist. They refused to obey the instructions and then a fight ensued, in which the claimant got the better of it. The following day the teamster returned with a reserve force, with the evident purpose of "getting even." Some intemperate language passed between them, and claimant, who was at work on the rear porch. David overheard the talk in the basement and came out and ordered them away. They refused to go and he engaged in a fight with them. Claimant thinking that his brother David needed help went to his aid and kept back some of the reserve force, but did not himself engage in the fight. While so engaged, one of the assailants, threw an iron missile and struck claimant in the eye, thereby permanently destroying the sight. Compensation was demanded by him under Act 10 of the Laws of 1912. The insurance company refused to respond and he thereupon made an application to the Industrial Accident Board. The claim took the usual course before the Board, and resulted in allowance being made of $10 per week for one hundred weeks. Respondents have brought the proceedings here for review with the claim that the award should be set aside on the ground that the injury did not arise out of and in the course of claimant's employment within the meaning of said Act.

The theory upon which claimant seeks to bring his claim under the statute, is that he received the injury while protecting his master's property against trespassers. Testifying as to his duties claimant said:

"I was in fact over all of the excavating, and from then on up until the work was finished, representing my brother when he wasn't there and when he was there."

Conceding claimant's authority and duty as are stated, he fails to make a satisfactory connection between them, and his

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acts at the time he received the injury. Had he received the injury on the previous day while he was endeavoring to protect his master's property against trespassers, the connection would be obvious. That incident happened the previous day, and appeared to be a closed incident except for the ill feeling which it engendered. The following day the same parties reappeared, not for a like purpose as on the previous day, but evidently for the purpose of getting revenge, although they claimed to be in search of a lost work ticket. They assailed claimant with words only, but their attitude toward him was threatening. David overheard it and came out of the basement and took charge of the controversy himself. After he had engaged in the fight and appeared to be succeeding, claimant, who had been an observer, came unsolicited to his brother's aid by keeping off the reserve force, and while doing so was hit with a flying missile and injured. It may have been commendable in him to volunteer to assist his brother against such great odds, but that does not satisfactorily answer the question what connection his acts had with his employment. He was not called upon to protect his master's property, as on the previous day. He was not asked to assist his master in the fight on the second day. His action was purely a voluntary one, and it seems to us no different than as though he had discovered the same men fighting with his brother a week afterward ten blocks away, or as though claimant had observed a fight going on across the street and had gone there to get a better view, and while there had been hit by a flying missile and injured. Had claimant remained at his work he would not have been injured. His presence at the place of fighting was in pursuance of no demand of his employment. Neither was it in aid of any material interest of his master. His presence there and the assistance which he rendered was solely in the interest of his master's personal safety. An injury received under such circumstances cannot be said, under a fair construction of the act, to have arisen out of and in the course of his employment.

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See *Collins* v. *Collins*, 2 Ir. R., 104.
Mitchinson v. *Day Bros.*, 6 Butterworth's C. C. 190.

But claimant says he was in charge of his brother's work while he was away, and also while he was present. If his brother David were present and did not assume to act, claimant probably had the authority to act, but when the master was present, and took personal charge of the matter himself, it necessarily excludes the idea of claimant's having charge of it.

The finding of the Industrial Accident Board must be reversed and the award set aside.

FRIEDA OPITZ,
Applicant,
vs.
CHARLES HOERTZ & SON, Et Al.,
Respondents.

EMPLOYER—INDEPENDENT CONTRACTOR—INSURANCE.

Applicant's decedent was killed while engaged in clearing up the wreckage of a fire which destroyed the plant of Brown & Sehler, his death being caused by the falling of a brick wall of the burned building. The work was being done under the immediate direction of Hoertz & Son, a firm of building contractors, pursuant to an agreement entered into with Brown & Sehler, providing for the clearing up of the debris and the erection of new buildings on the site. It was contended by respondents that Hoertz & Son were employed merely to superintend and direct the work and that Brown & Sehler were in fact the employers of deceased.

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HELD: 1. That Hoertz & Son had full and unrestricted charge of the work, together with the men employed thereon, and that under all the facts and circumstances of the case they were independent contractors and liable as the employer of decedent for the payment of compensation to the widow.

2. That under the provisions of the Workmen's Compensation Law, the insurance carrier is directly liable to the injured workman or his dependents, and that the Board has authority in making its award to determine and fix the liability of the insurer.

Application to Industrial Accident Board to decide who were the actual employers of Carl Opitz, who was killed while at work.

Opinion by the Board:

On February 1, 1915, Carl Opitz, applicant's husband was killed while working on the premises of Brown & Sehler in Grand Rapids, he being engaged with other men in clearing up the wreckage of the fire that destroyed the Brown & Sehler buildings. The site was being cleared for the purpose of erecting new buildings thereon. The work was commenced on the morning of February 1st with a force of about 35 men. At one-thirty in the afternoon of that day a brick wall of the burned building fell, causing the death of Carl Opitz and several other men, besides seriously injuring a number of the workers. It is conceded that the accident arose out of and in the course of the employment of deceased and that the applicant in this case was wholly dependent. It is also conceded that both Hoertz & Son and Brown & Sehler were under the Michigan Workmen's Compensation Law, and that the Southwestern Surety Insurance Company was insurer of Hoertz & Son under such Compensation law.

The question as to who was the employer is the main point in dispute in the case, and the settlement of this point will be conclusive as to the other cases pending before the Board for injury and death growing out of this accident. It is claimed

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on the part of Hoertz & Son that Brown & Sehler were the employers and that Hoertz & Son were merely acting as superintendent and agent for such owners in clearing the site and erecting new buildings following the fire. On the other hand it is claimed by Brown & Sehler that Hoertz & Son were independent contractors in the performance of the work in question, and that said Hoertz & Son were the employers of the men killed and injured, and therefore liable to pay the compensation. The question of the liability of the Insurance Company and the right of the Board to make an award against it is also involved.

Brown & Sehler were engaged in manufacturing and selling harnesses, saddlery and leather goods, their business being carried on in the three and four-story building owned by said firm, located on the west bank of the Grand River and fronting on Bridge Street in Grand Rapids. The firm had been engaged in this business for a number of years, having a considerable number of employes, and operating under the Workmen's Compensation Law without insurance, having been permitted to carry their own risk by the Board. On the night of January 15th, their building and plant were destroyed by fire, the interior of the building being a complete wreck, but leaving a portion of the brick walls standing. The firm was desirous of clearing up the site and erecting new buildings, and entered into negotiations for that purpose with Hoertz & Son, who were extensively engaged in the business of contracting and building in the city of Grand Rapids and elsewhere, and such negotiations resulted in the following written proposal being made to Brown & Sehler on January 29th, viz.:

"January 29, 1915. Brown & Sehler Company, Grand Rapids, Michigan:—Gentlemen:—We hereby propose to superintend and furnish a superintendent for the clearing of your site, and any new buildings you will build immediately, for 10% the actual cost of labor and new material required in re-construction. It is the understanding that we are to co-operate with you in the purchase of any new material and work in accordance with your wishes, or the hiring of teams and men. This proposition carries with it that Hoertz & Son will furnish all the necessary tools required to carry on this work in first class shape,

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and that the owner pays all bills, and that the 10% is figured from the net cost price. Respectfully yours, Chas. Hoertz & Son, W. C. Hoertz."

This proposal was made to Brown & Sehler on January 29th, which was Friday. On Saturday morning, January 30th, both Charles Hoertz and William C. Hoertz called at the temporary office of Brown & Sehler and discussed the matter with Mr. Sehler, discussing general matters and some details. Mr. Sehler, on the part of his firm, accepted their proposal verbally, and told them to go ahead with the work. Hoertz & Son thereupon made preparations to commence the work on Monday morning, February 1st, and among other things placed their advertisement in some of the Grand Rapids papers for men wanted at the Brown & Sehler building for work, and on Monday morning they put about 35 men to work on the job. all of them being hired for the purpose, except the superintendent and timekeeper who were regular employes of Hoertz & Son.

Before commencing work on Monday morning, William C. Hoertz made out, dated, signed and had posted on the premises notices to employes that their employer was operating under the Michigan Workmen's Compensation Law, the same being the blank notices furnished employers for this purpose by the Industrial Accident Board, 12 by 18 inches in size, such notices reading as follows:

"NOTICE TO EMPLOYES.

All workmen or operatives employed by the undersigned in or about this establishment are hereby notified that the employer or employers owning or operating the same have filed with the Industrial Accident Board, at Lansing, notice of election to become subject to the provisions of Act No. 10 of Public Acts, Extra Session, 1912.

(This Act is commonly known as the Workmen's Compensation Law.)

You are further notified that unless you serve written notice on your employer of your election not to come under the law, the act will immediately apply to you.

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If you do notify your employer that you elect not to come under said act, you may afterwards waive such claim by a notice in writing, which shall take effect five days after it is delivered to the employer. At the expiration of which period the law will apply to you.

INJURY NOT RESULTING IN DEATH—NOTICE OF

(How to Proceed, etc.)

INJURY RESULTING IN DEATH—NOTICE OF

(Provisions as to notice, etc.)

LIMIT OF PERIOD OF NOTIFICATION.

(Provisions of Law given, etc.)

Date 2/1-1915 7 A. M.

Chas. Hoertz & Son, Employer.
By Wm. C. Hoertz.
(For Brown & Sehler Co.)"

The words "for Brown & Sehler Co." are given in parenthesis above, for the reason that they are written in a different hand-writing and smaller than the signature, "Chas. Hoertz & Son, By Wm. C. Hoertz."

Hoertz & Son or their superintendent selected the men who were put to work, employed them, fixed their wages, and directed and controlled their work. It is true that Mr. Sehler was desirous that some of the old employes of Brown & Sehler be given work, and a couple of these men were set to work by Hoertz & Son at his request. It is also true that Mr. Sehler made some suggestions as to where to begin the work and the handling of some of the material, but we think the record fairly shows that this was by way of suggestion and for the purpose of enabling him to look after salvage if any property was found in the debris worth saving. The work of clearing the site and debris occupied something more than two weeks time, and the erection of the new buildings thereafter required a couple of months. Hoertz & Son had been engaged in the

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business of contracting and building for 15 years and upwards in Grand Rapids and vicinity, had offices, tools and appliances for the work, and were engaged in the business of contracting and building as an independent business, which appears to have been carried on successfully by them on a large scale. As such contractors they had other buildings in the course of erection at the time of the accident, some being done on a basis of a percentage of the cost of labor and material.

Saturday forenoon, January 30th, some talk was had between Wm. C. Hoertz and Brown & Sehler relative to insurance, which resulted in Mr. Hoertz calling up the office of the Southwestern Surety Insurance Company in Detroit and talking with Mr. Evans, the agent of said company. Mr. Hoertz testified that the purpose of the call was to arrange for liability insurance for Brown & Sehler's employes, and that such arrangement was made by telephone, he to send on a check for $25 on behalf of Brown & Sehler as a binder. He further testified that the check was sent before noon on Saturday and that the insurance was to be in effect at 12 o'clock January 30th. It appears that the check was in fact sent on the date referred to, and was received by the insurance company and cashed. It further appears that Mr. Evans, representing the Surety Company, came to Grand Rapids on February 3rd, immediately saw Wm. C. Hoertz and attached to his liability insurance policy a rider, the principal portion of which is as follows:

"January 30, 1915. It is understood and agreed that this policy is hereby extended to cover operations as listed in the schedule of policy in connection with the contract for Brown & Sehler building, Bridge and Front Streets, Grand Rapids, Michigan. Subject otherwise to all the conditions, agreements and limitations, etc. * * * Countersigned at Detroit, Michigan, this 30th day of January, 1915. Morley & Coleman, General Agents, per Warren A. Morley."

After attaching this rider to the policy, Mr. Evans and Wm. C. Hoertz went around to the families of all of the men who suffered from the accident, and Mr. Evans, who assumed to speak for the Surety Company, told the injured men and their

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dependents that the compensation provided for by the law would be paid, etc., explaining to all of them that Chas. Hoertz & Son were covered by the policy of the Surety Company.

The work was in progress less than a day before the occurrence of the accident, but no claim is made by respondents that it was handled or conducted differently from what was originally intended by the parties, or that any changes were made in the manner of handling the work or the men after the occurrence of the accident. Hoertz & Son, it appears, got right onto the job with their tools and appliances, organized their force and proceeded to do the work in the manner usual with contractors. They planned the ways of doing, and the means as well, purchased the materials and employed and directed the men, and in the end delivered the complete result to the owners, receiving therefor, in addition to the actual cost of labor and material, 10% thereof. It fairly appears that Brown & Sehler had no expert knowledge of building and did not assume to do any part of the work or direct the manner of handling or performing it, they being apparently not qualified by knowledge or experience so to do. Hoertz & Son discharged the men and fixed or changed their wages as they saw fit, and handled the entire work and the men employed thereon with as full and complete control and authority as if they were the sole owners or employers. It also seems clear that the parties at the time of entering into the contract understood and intended that the matters would be so handled, and that the parties would conduct themselves with reference to is substantially as they did.

The written proposal at first blush would seem to imply that Hoertz & Son were only to supervise and act as agent for Brown & Sehler in doing this work. The writing, however, is to be read in the light of the surrounding circumstances and conditions, and the actions of the parties with reference to the same. The true purpose in the interpretation of contracts is to ascertain the intent of the parties, the writing being an aid to this end and in many cases conclusive. The correct rule, we think, is declared by the U. S. Court of Appeals,

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Sixth Circuit, in the case of *Mishawaka Woolen Manufacturing Company* vs. *Westveer,* 191 Federal Reporter 467; as follows:

"The Court looks not merely to the whole instrument, but also to the acts and circumstances attending its execution and performance."

Keeping in mind the fact that Hoertz & Son were exercising and following an independent business of their own, maintaining an office, tools, appliances, and equipment, and accustomed to take jobs on a percentage basis, and applying the broad rule of interpretation above-referred to, we are forced to the conclusion that the status of Hoertz & Son was that of independent contractors, and that they were in fact the employers. It might further be said that the conduct of Hoertz & Son in advertising for men to do this work, posting the notices with reference to the Compensation Law, and employing and directing the men as in this case, would go far to preclude them from denying to such men the right to claim compensation from Hoertz & Son when injured. Naturally the men who answered the advertisement, who were met by Hoertz & Son and their superintendent and hired, and who saw the notices with reference to the Compensation Law posted, would enter upon the work in the belief that they were the employes of Hoertz & Son and entitled to compensation from that firm, if injured in the course of their employment.

The Workmen's Compensation Law provides that the insurance carrier shall be directly liable to the injured workman or his dependents, and that such liability may be enforced against such insurer. It also provides that all questions arising in the administration of the Workmen's Compensation Law shall be determined by the Industrial Accident Board. We are therefore, of the opinion that the Board has authority to make an award against the insurance carrier, as was done in this case.

Award affirmed.

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PIETTERNELLA VISSER,
Applicant,
vs.
MICHIGAN CABINET COMPANY,
Respondent.

FRIGHT OR SHOCK—ABSENCE OF PHYSICAL INJURY.

Applicant's decedent was loading some stock on an elevator when it suddenly started up. The elevator was stopped and the stock was replaced on the truck, and after wheeling it about 40 feet applicant fell to the floor and expired a few minutes after he was picked up. A post mortem examination disclosed that he was suffering from organic disease of the heart and it was the opinion of the medical witnesses that while deceased received no physical injury the shock and excitement resulting from the sudden starting of the elevator probably caused his death.

HELD: Where death or disability results from fright, unaccompanied by any immediate physical injury, no compensation can be had.

Appeal of Pietternella Visser from decision of an arbitration committee refusing to make an award for the death of her husband. Affirmed.

Opinion by the Board:

Gerrit Visser was working in the employ of respondent as a lugger in its factory at Grand Rapids. Part of his duties required him to move the unfinished stock from various floors in the factory to the lower floor by use of a truck, and in passing from one floor to the other a large elevator was used. On November 26, Visser was moving a truck loaded with drawers from the second floor to the first floor of respondent's factory. He wheeled the truck load on to the elevator at the second floor, then descended with the elevator to the first floor and proceeded to wheel the truck from the elevator. The

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elevator started upward when the truck was partly off, causing it to tip so that some of the drawers fell off. Other employes of the respondent stopped the elevator, which was large and slow moving, when it was about two and one-half feet above the floor. The truck was then adjusted and the drawers which had fallen off were replaced by Visser and another employe. Visser then proceeded to wheel the truck from the elevator shaft to another portion of respondent's factory, and after wheeling it about forty feet he fell to the ground. He was picked up and carried into the office and died a few minutes afterward. A post mortem examination was held which showed that he was suffering from organic disease of the heart. While he received no physical injury, it is apparent that the nervous shock and excitement resulting from the upward movement of the elevator affected his heart in its diseased condition, and in the opinion of some of the medical witnesses probably caused his death.

The case presents squarely the question, whether compensation can be recovered where death or disability results from fright unaccompanied by any immediate physical injury. Under the authority of

> *Nelson* vs. *Crawford,* 122 Michigan, 486, and
> *Schroeder* vs. *Railway Company,* 20 D. L. N., 251

recovery could not be had in such cases. The case of *Yates* vs. *Colliers, Ltd.,* 3 B. W. C. C., 419, seems to establish the opposite rule under the British Workmen's Compensation Law. The question is one of great importance. If the Compensation Law is held to cover cases of fright or nervous shock unaccompanied by physical injury, it will bring under the Compensation Law a large class of cases for which compensation by way of damages has heretofore been denied in Michigan. While the question is not free from doubt, we are of the opinion that our statute was not intended to cover the class of cases above mentioned. We also think that it is desirable to have this question finally settled by an early decision of the

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Supreme Court. The decision of the committee on arbitration is affirmed.

JACOB RIDER,
Applicant,
vs.
THE C. H. LITTLE COMPANY,
Respondents.

INJURED TEAMSTER NOT REGULARLY EMPLOYED—OWNER OF TEAM AND WAGON.

The applicant was the owner of a team and wagon, and was engaged in hauling dirt for respondent, receiving for the work of himself, team and wagon $6 per day. While so engaged he received injuries to two fingers by which he was totally disabled for 2½ months, and which resulted further in causing a permanent stiffness by reason of which the applicant has only partial use of such fingers. An arbitration committee awarded the applicant compensation for 43 weeks at 50% of his average weekly wage. Respondent's contention is that Rider was not their employe within the meaning of the act and that the award of compensation was excessive.

HELD: 1. The fact that the applicant worked under orders of respondent's foreman, and was required to conform in detail to the regulations and system of work of defendant was sufficient to make him an employe of defendant within the meaning of the compensation law.

2. The fact that applicant was totally disabled for 2½ months, and that the injury resulted in a partial loss of the use of his fingers, which condition was permanent, is such as to make the compensation award a reasonable one.

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Opinion by the Board:

The applicant, Jacob Rider, was the owner of a team and wagon, and had been engaged in the general teaming business in Detroit for a number of years prior to his injury. He had worked on and off with his team for respondent during a period of about six years. He had been working steadily for respondent for about seven weeks prior to his injury, which occurred on November 7th, and was receiving $6.00 per day for himself, his team and wagon. The work in which he was engaged was hauling dirt for respondent. There were from twelve to fifteen teams engaged in the same work, and the wagons were loaded with a mechanical device called a "clam" which was operated in practically the same way as a steam shovel. The clam would be let down and filled with dirt and closed by the machinery. It would then be raised and swung around over the wagon which was to be loaded. The teamster would steady the clam so as to be over the portion of the wagon that needed filling, and the operator of the machine would then cause it to open and drop the dirt in the wagon. The injury in this case was caused by the clam closing on Mr. Rider's fingers after the dirt had dropped in the manner above indicated. The first and second fingers were badly broken and lacerated. Defendant was totally disabled from work by the injury for two and one-half months, and the injured fingers have become stiff and have lost to a large degree their power of closing and their usefulness. The committee on arbitration awarded the applicant compensation for forty-three weeks at fifty per cent of his average weekly wages. This decision is appealed from by the respondent upon the following grounds:

1. That Rider was not an employe of respondent within the meaning of the compensation law.

2. That the award of compensation is excessive. It appears from the evidence that Rider was licensed as a teamster in the city of Detroit, and that he engaged in doing such various jobs of teaming and transfer work as he could get to do from time

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to time. It is also shown that he was required to have a license under the city ordinance, and that such licenses are required of teamsters except in some instances where firms like respondent use their own teams and teamsters in their business, and have their names printed on their wagons. It also appears that Rider worked for respondent from time to time during the past six years, and that he worked for respondent steadily with his team and wagon from about the 14th of September until the date of the injury, doing the same work as the other teamsters of respondent, and doing no other work with his team and wagon during that time. He was hired for $6.00 a day. It is undisputed that the regular wages of a teamster for that class of work is $2.50 a day and the regular wage for a team and wagon $3.50 a day, and Mr. Rider claims that he was employed at $2.50 a day for himself and $3.50 for his team and wagon. He worked under the orders of respondent's foreman, who directed him how to do the work, where to go, how to make deliveries, and required Rider to conform to all of the regulations as to the work done and the manner and system of doing it and was required of the other teamsters of respondent. It clearly appears that respondent through its foreman kept a close supervision over the work and movements of Mr. Rider and directed and controlled the same in every particular. In the opinion of the Board, Mr. Rider was an employe of respondent within the meaning of the compensation law at the time he was injured, and the fact that his team and wagon was also employed in the work did not make him a contractor nor in any way change his status as such employe.

The fact that he was totally disabled for two and one-half months is undisputed, and the fact that the first and second fingers of his hand are permanently injured is also undisputed in the case. In the opinion of the board it is fairly shown that the injury (which is permanent in its character) to applicant's first and second fingers has caused a loss to him of one-half of the use of such fingers. The board has held in other cases that where the use of a finger is destroyed by an injury,

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that it is equivalent to the loss of such finger whether the same is amputated or not. That the real test is not the action or non-action of the surgeon as to cutting off the finger, but it is whether the injured person has been deprived permanently of the use of such finger even though it was not amputated. Upon the same principal an injury which destroys one-half of the beneficial use of a finger should be rated as the loss of a half finger, and if that rule is applied in the present case the award of forty-three weeks' compensation will be correct. Substantially the same result would be reached, we think, by treating the permanent injury to the fingers as a permanent partial disability. The award of the committee on arbitration is affirmed.

X. B. KONKEL,
Applicant,
vs.
FORD MOTOR COMPANY,
Respondent.

BURIAL EXPENSES—CONTRACT FUNERAL.

An employe of respondent was killed while at work and left no dependents. In accordance with Sec. 8, Part II, of the compensation law, respondent was liable for the funeral expenses not exceeding $200. Respondent made a contract with an undertaker, the applicant, to furnish and conduct the funeral for $75, and further agreed to pay $15 for the cemetery lot. Applicant presented a bill for $104, stating that the extra $14 was for three carriages furnished for friends of the deceased who attended the funeral. Respondent refused to pay the extra $14, claiming that it was an overcharge and that the agreement practically excluded carriages.

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HELD: 1. That the right to the custody and burial of the dead belongs to the family, next of kin, near relatives and friends of the deceased, and that the compensation law does not assume to take away or interfere with this important right.

2. That the employer has no authority to contract for funerals with an undertaker in such a way as to arbitrarily fix the number of carriages or to decide in certain cases that no carriages shall be provided. These are matters for the family or next of kin to decide and arrange for, provided the expense is reasonable and does not exceed the limit fixed by law.

Appeal of X. B. Konkel to compel the Ford Motor Company to pay his claim for funeral expenses incurred in the burial of one of respondent's employes.

Opinion by the Board:

This case involves the question of funeral expenses, the deceased workman, John Ovczieneko, having left no dependents. Section 8, Part II, of the act provides that in cases where the employe leaves no dependents, the employer shall pay or cause to be paid the reasonable expenses of his last sickness and burying, which shall not exceed $200. It is claimed by respondent that it entered into a contract with the undertaker, X. B. Konkel, to furnish and conduct the funeral of deceased for $75, the respondent to pay in addition thereto the cost of the cemetery lot, which was $15. After the funeral was had the claimant presented a bill to respondent for $104, being $15 for the cemetery lot and $89 for the funeral. The precise claim of respondent is that the claimant had made an overcharge of $14, claiming $89 for the funeral when the agreed amount was $75. The claimant admits that the price agreed upon for the funeral was $75, but claims that the relatives and friends of the deceased when the funeral came on required him to furnish three additional hacks and that the $14 additional charge is for those hacks, which were actually furnished and used at the funeral. The only relative of the deceased who resided

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here and attended the funeral was a brother, but many friends and acquaintances of the deceased attended, and some of them rode in the three hacks to the cemetery. The agreement between the claimant and respondent with reference to the funeral practically excluded hacks, the precise contention of respondent being stated as follows: "The deceased had absolutely no family nor friends in this country, outside of his brother, and this company will not pay for pleasure carriages for funeral purposes and if people desire to go for a ride or an undertaker desires his friends to go for a ride, they must pay for their carriages. * * * That after an absolute contract was made the undertaker should not go ahead and incur additional expenses."

It will be seen that this case involves the fundamental question, has the employer the right to order and contract for the funeral in cases of this kind, and can he limit the item of expense and the character of the funeral. If he has this power then the contract entered into with claimant would be controlling and the additional expense incurred for carriages would be unauthorized. The Board, however, is clearly of the opinion that the employer has no such power. The right to the custody and burial of the dead belongs to the family, to the next of kin, to the near relatives and friends. The right is inherent and universally recognized. They may make the funeral as to form, rites, procession and burial whatsoever their sentiment, judgment and traditions dictate. The compensation law does not assume to take away or in any manner interfere with this important right of the family and relatives of the workman in death cases like this. The law merely provides that the employer shall pay the expense, or cause it to be paid, and that the amount of his liability for such expense shall not exceed $200. It does not give him the right to contract with the undertaker, or even to select the undertaker. Much less does it give him the right to arbitrarily fix the number of carriages, or to decide that in certain cases no carriages shall be provided. These are matters for the family and next of kin to decide and provide for, and if the expense is reason-

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able and does not exceed the limit fixed by law, it should be paid by the employer. In this case the extra hacks were ordered by the next of kin and friends of deceased, and were used to convey his friends to the place of burial. In the opinion of the Board they were reasonably necessary, and the bill of claimant for $104 is allowed and ordered paid.

JOHN JANKOWSKI,
Applicant,
vs.
AMERICAN CAR & FOUNDRY COMPANY,
Respondent.

INTENTIONAL AND WILFUL MISCONDUCT.

The applicant was working under a car in the process of construction in such a position that he would be seriously injured by the moving of the car while so engaged. The usual signals preceding such movement were given and applicant had been instructed in the same.

HELD: That the failure of the applicant through inattention, lack of mental alertness or on account of the noise, to hear and comprehend the signals did not under the facts in this case, constitute intentional and wilful misconduct.

Opinion by the Board:

The applicant, John Jankowski, was severely injured in one of the factories of respondent in Detroit, by the moving of a car under which he was working. He was employed as a "sweeper" in respondent's factory which is known as the

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"Peninsular Department," where the respondent was engaged in the construction of cars of various types. He was working in a large room on the floor of which there are approximately 16 railroad tracks which are used for cars in the process of construction. From time to time as different parts of the construction work are finished, the cars are moved along the tracks to other parts of respondent's plant. Applicant's duties were to maintain order throughout the shop by sweeping and picking up rubbish from the floor and also from under the cars. Shortly before he was injured, he went under one of a string of three cars to clean up, that is, to pick up some pieces of wood and iron from the floor. Work was being done at that time by carpenters and others upon these cars and also upon the cars on an adjoining track, the men using heavy hammers in their work and making considerable noise.

There were certain rules promulgated by respondent's foreman in charge of the train under which applicant was injured. One of these rules provided for the blowing of certain warning whistles before moving the cars along the track. The foreman in his testimony states the rule, as follows:

"I just blow once and then I look around and see if everything is clear; then blow twice and wait a few seconds and then blow three times; that is the last, for the men all know when the third whistle comes the car is going to be pulled in a very short time. I have no fixed time between whistles. Most of the time there is between three and five minutes between first whistle and the next two whistles; I never take out my watch."

The rule as established and understood by the men was that all persons working inside or around the cars should get out of danger upon the sounding of the first whistle, and it was so understood by the applicant. No printed or written rule to this effect was posted in the factory, but the rule was communicated to the men by the foreman working in and about the cars. There is a whistle for each track, and the one in use in connection with the track on which applicant was injured was strong enough to be heard for some distance beyond the limits of the room in which the work was being done,

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and at the time the signals were given for the movement of the cars in question no other whistle was being blown. While there was considerable noise in the room from the general occupation, it was not enough to prevent one from hearing and understanding the signals. A few minutes before the accident applicant went under one of the string of cars above referred to at a point about 60 feet from where the whistle was located, and with a broom and keg was engaged in picking up pieces or iron and wood which had dropped under the car in the course of the construction work. Before the cars were moved, the usual whistle signals were given. Applicant's hearing was normal. He remained under the car and was seriously injured when it was moved. The signals that the cars were about to be moved were in fact given by blowing the whistles according to rule, and the applicant was familiar with and instructed in such signals. It is claimed that his failure to heed the signals and promptly go to a place of safety before the cars were moved constituted intentional and wilful misconduct within the meaning of the law.

In the opinion of the Board this contention cannot be sustained. Through inattention, lack of mental alertness, or on account of the noise, or for some other reason, applicant failed to hear and comprehend such signals, in the sense that said signals did not convey to his mind on the occasion in question a realization of the fact that the car under which he was working was about to be started. An alert, careful man in the position occupied by applicant would have heard and understood the signals, but under the facts and conditions in this case where applicant must have known that serious injury would result to him from the moving of the car while he was so working under it, the Board cannot believe and therefore cannot find that applicant heard and understood the signals in the sense above stated.

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SAMUEL J. MALZAC,
Applicant,
vs.
BRULE TIMBER COMPANY,
and
AETNA LIFE INSURANCE COMPANY,
Respondents.

DEPENDENTS—PARENT AND CHILD.

The applicant, a minor whose parents had separated, was living with his grandparents and being supported by them at the time of his father's death. The father was not contributing to his son's support or maintenance except that he provided for him clothing, some life insurance, and at times assisted the grandparents on the farm. On the death of the father as a result of an accident while in the employ of respondent, the child applies through his guardian for compensation as a dependent under the statute.

HELD: 1. That the law does not limit dependency of minor children to cases where actual support was being furnished or contributions made, as such a rule would in many instances exclude children from the benefits of a law that was clearly intended for their protection.

2. Where there is a direct legal obligation to support, as in the case of a father to his minor children, coupled with the reasonable probability of such obligation being fulfilled, dependency is established even though no support was in fact being furnished at the time of the workman's death.

Application by Samuel J. Malzac for compensation for the death of his father, as a dependent within the meaning of the Workmen's Compensation Law. Granted.

Opinion by the Board:

Samuel Malzac, the father of applicant, while working as a teamster for defendant Lumber Company, was instantly killed

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by the fall of a gin-pole used in skidding logs. It is conceded that his wages amounted to $50 per month and that the accident arose out of and in the course of the employment. The remaining facts are stipulated by the parties as follows:

"Deceased left surviving him a wife, Blanche Malzac, with whom he had not lived since September, 1912, and to whose support he did not contribute since that date, and said wife makes no claim for compensation."

The stipulated facts then proceed as follows:

"Deceased also left surviving him a minor son, Samuel Malzac, Jr., who was born December 25th, 1909, but said minor son, when about 4 or 5 months old, was left with Alphonse Malzac, his grandfather, and has since that time been making his home with said Alphonse Malzac; that the father, the deceased, has not in any way contributed to the support or maintenance of Samuel Malzac, Jr., since this minor son went to the home of his grandfather, excepting that during the summer of 1913, deceased bought a complete outfit of clothing for his son, worth approximately $9.00; excepting that during the months of March and April, 1911, said Samuel Malzac, deceased, and Blanche Malzac, his wife, lived together for a period of four or five weeks, during which time said Samuel Malzac supported and cared for said child, and that again in the months of August and September, 1912, said Samuel Malzac and said Blanche Malzac, his wife, lived together for a period of four or five weeks, and during said time the said Malzac supported and cared for said child. That deceased did not in any way pay any money to Alphonse Malzac, for the support or maintenance of his son. That deceased carried a life insurance policy for $1,000 in the Brotherhood of American Yeoman, the beneficiaries as named therein were Lucy Malzac, his mother, and Samuel Malzac, Jr., his son, each to receive one-half of said $1,000 at deceased's death. That the grandfather, Alphonse Malzac, caused to be issued a life insurance policy in the Metropolitan Life Insurance Company, Policy No. 48107514, premium 10 cents per week, beneficiary named therein being Alphonse Malzac, grandfather, said policy being on the life of Samuel Malzac, Jr. That at the time said policy was issued, Samuel Malzac, deceased, signed a paper authorizing the Metropolitan Life Insurance Company to issue the said policy to said Alphonse Malzac, as beneficiary. That at said time said Alphonse Malzac attempted to adopt said Samuel Malzac, Jr., but said adoption proceedings were not completed. That deceased at various times, when out of work, would make his home with Alphonse Malzac, his father, but at said times would not in any way contribute to the sup-

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port of his minor son, nor would he pay anything to his father, Alphonse Malzac, except by assisting a little around the small farm owned by said Alphonse Malzac. Therefore the only question in dispute is as to whether or not Samuel Malzac, Jr., is a dependent, under the terms of the Michigan Workmen's Compensation Law, herein described." The accident in question happened on December 13, 1913.

It is contended by respondents that no dependency is shown in this case and therefore no compensation is payable, the contention being based upon the claim that no contributions were being in fact made by the father for the support of applicant at or immediately prior to the time of his death. It is contended on behalf of the applicant that he is wholly dependent.

This squarely presents for determination the question of the application of the Workmen's Compensation Law in cases of minor children who do not fall within the class covered by the conclusive presumption of dependency, when the father or other parent is taken away by an industrial accident. Where the father is entirely supporting such child or children, or has been making material contributions for their support, little difficulty is experienced in applying the law. However, many cases arise where by reason of moving, financial difficulties, changes in families, or any of the numerous arrangements under which chidren are cared for by relatives, friends or organizations, dependency cannot be determined on the basis of past contributions and support furnished by the deceased parent, as no such basis exists. It seems clear that the law does not intend to limit dependency of minor children to cases where actual support was being furnished or contributions made, as such a rule would in many instances leave infant and posthumus children outside of the benefits of the law, which was clearly intended for their protection. The English courts, including the House of Lords, have established the rule that posthumus children are dependents within the meaning of the British Act, which in this respect is substantially the same as ours, holding that a reasonable

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anticipation that the children would be maintained is a sufficient basis. Orrell Colliery Company vs. Schofield, 2 B. W. C. C. 295.

From a careful examination of the authorities it seems clear that the word "dependent" is used in Workmen's Compensation Laws to describe or designate a state or condition of the person referred to, having regard to his class and position, and not one who merely derived a benefit from the earnings of the deceased workman. Boyd's Workmen's Compensation, 496; Lloyd v. Powell Coal Co., 7 B. W. C. C., 333. The confusion on this point that seems to have arisen in connection with the case of New Monckton Collieries, Ltd. v. Keeling, 4 B. W. C. C., 332, is in the judgment of the Board cleared up by the case of Young v. Niddrie & Benhar Coal Company, Ltd., 6 B. W. C. C. 782, the latter case being decided by the House of Lords in July, 1913, some two years after the decision in the Keeling case. The Keeling case is referred to in some of the text books as "the great case * * that finally settles the law on the whole subject." Bradbury's Workmen's Compensation Law, 573. The conclusion there reached by the House of Lords that the dependency of the wife, who was not being supported by her husband, was not established by the mere fact of the existence of a legal obligation to support, is made prominent. The Young case above cited distinguishes the *Keeling Case* and supplements it particularly with reference to minor children. In the Young case, it was contended that the true question is "Was the applicant actually receiving support from one who was under an obligation to give support, and who was also the servant of the master whom it is proposed to make liable in compensation?" As to this proposition the Court say:

"I cannot agree with this view of the true question. I agree that a mere legal right may not, in certain circumstances, be sufficient. * * The true question in the present case is, in my opinion, whether there was, as one of the facts to be taken into account, an effective and valuable legal right. If there was such a right, and there was no legal difficulty in the way of enforcing it, then the mere fact that a want of opportunity to resort to it, which might have proved only

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temporary, had reduced the mother and children for the time to living on charity, cannot affect the conclusion that by the father's death they lost something on which they could depend. * * I am of the opinion that these children were wholly dependent. They had the right to look to their father for maintenance. * * It was only by assistance from their brothers, assistance which might have ceased at any moment, that they were saved from actual want."

Again in the same case, Page 782, it is said:

"There may be cases in which the husband's legal obligation to support his wife may be held to be suspended, but when that legal obligation, not discharged by the husband, concurs with total destitution on the part of the wife and inability to support herself, the bare fact that at the date of his death the husband was not implementing his obligation is not sufficient to prevent us from holding that the wife was wholly dependent on him. Neither, in my opinion, is the question affected by the fact that during the husband's absence and neglect the wife was kept from starvation by the casual charity of strangers, or even relatives."

The rule laid down in the *Young* case may be fairly summed up as holding that where there is a direct legal obligation to support, as in the case of a father to his minor children, coupled with the reasonable probability of such obligation being fulfilled by furnishing such support either voluntarily or involuntarily, dependency is established, even though no actual contributions or support were in fact being furnished prior to the death of the workman. This is not in conflict with the case of Pinel v. Rapid Railway System, 184 Mich., 169, as in that case the obligation of the deceased to support the applicant, who was his mother, was indirect, and did not in fact become a legal obligation until made so by proper legal proceedings. On the other hand, the obligation of a father to support his children is direct and immediate. The rule is also in harmony with the case of Ingersoll v. Detroit & Mackinac Railway Co., 163 Mich., 268. In the latter case, suit was brought for a wife and infant child who were residing in another state and receiving no contributions or support from the deceased workman. The trial court directed a verdict for defendant on the ground that there was no de-

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pendency and plaintiffs suffered no pecuniary loss by the death. The Supreme Court, in a well considered opinion citing many authorities, reversed the judgment, holding that the legal right to support coupled with a reasonable probability of receiving it was sufficient to establish plaintiff's case, and that the wife and child could recover for the contributions, voluntary or forced, that would probably have been made by deceased in their favor.

In the case at bar, it is apparent that the wife had separated from the husband under such circumstances as to exclude any claim by her, and that no support or contributions from her could be expected by the applicant. On the other hand, the applicant's father up to the time of his death provided clothing for his son, also life insurance, and assisted the grandparents on the farm. Apparently the grandparents were entirely willing to support the applicant, and we think it fairly appears that had it been otherwise the father would not have permitted him to want. While the father lived the probability of furnishing support together with the legal obligation so to do would continue, and upon this the applicant had a right to depend. By the father's death this guaranty of support is taken away, and the support that was being furnished by the grandparents might be withdrawn at any moment. We think under the facts and authorities that the applicant was wholly dependent. He had a right to look to his father for support, and the probability of receiving it, in the judgment of the Board, was so strong as to amount almost to a certainty. The theory that this four year old child cannot be considered a dependent under the law when his father is taken away by an industrial accident, on account of the fact that he was being supported by his grandparents, such support being voluntary and perhaps temporary, is unsound in the judgment of the Board and must be rejected. While the fact of support being actually furnished by the deceased workman prior to his death is an important circumstance bearing upon the question of dependency, it is not controlling. Such circumstance does not create the dependency in cases of this

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kind, but is merely an element tending to show that a state of dependency in fact existed.

KEYES-DAVIS COMPANY,
Applicant,
vs.
LEE E. ALDERDYCE,
Respondent.

LIABILITY FOR ACCIDENT OCCURRING OUTSIDE OF THE STATE.

Respondent was employed as a traveling salesman by applicant, and was injured in Buffalo, N. Y., while in the active discharge of his duties.

HELD: That respondent is not entitled to compensation, on the ground that the provisions of the compensation law do not cover accidents occurring outside of the state of Michigan, even though both parties are residents of this state.

Application of Keyes-Davis Company for ruling on question of injury occurring in another state. Both parties stipulated the facts and waived arbitration proceedings and case was heard by full Board.

Opinion by the Board:

The applicant and respondent are both residents of Battle Creek, Michigan. The respondent was in the employ of the applicant as a traveling salesman, and was injured at Buffalo, New York, by a fall received in the office of the Larkin Com-

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pany, where he was on the business of his employer. The sole question involved in this case is whether the Michigan Workmen's Compensation Law is operative beyond the boundaries of the state of Michigan. The applicant contends that it is not and that there is no liability for the payment of compensation for an accident occurring outside of the state.

It is a general rule of law that every statute is confined in its operations, to persons, property and rights which are within the jurisdiction of the legislature which enacted it; and if a citizen of the state leaves it and goes into another state he is left to the protection of the laws of the latter state.

> Black on Interpretion of Laws, Page 91;
> Lewis Sutherland's Statutory Construction, Sections 13 and 14.

This, however, seems to be based upon a rule of statutory construction, rather than upon a lack of legislative power to make such a law operative outside the limits of the state. Under this rule of construction there is a strong presumption in case of every statute that it is intended to operate and be effective only within the limits of the state or country which enacted it, and in the absence of evidence in the law itself that it was intended to have an extra-territorial operation, the presumption seems to be conclusive.

From our examination of the Michigan Workmen's Compensation Law we find no internal evidence of an intent that the law should be operative outside of the boundaries of Michigan. The language used in the act is general and broad enough to include injuries occurring without the state, but under the above rule of construction such general language is limited and held to be intended for application only to persons, property and rights within the state. There is another feature of the act which reinforces this position and indicates affirmatively the intention of the legislature to so limit the operation of the law, and that is the requirement in Sec-

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tion 8 of Part III that the hearings to adjudicate disputed claims for compensation "shall be held at the locality where the injury occurred." If the act is held to be operative outside of the state, this requirement might make it necessary for members of the Board to go to the most distant portions of the United States, or even to foreign countries, to hear and adjudicate disputed claims for compensation.

The fact that both parties are residents of Michigan and the contract of employment was a Michigan contract will not, we think, change the rule. The obligation to pay compensation is not a matter of contract, or based upon contract, but is a statutory duty, created by statute and existing only by force of such statute. If this is correct, and the statute is inoperative at the place where the accident happens, the happening of the accident creates no obligation to pay compensation.

2 B. W. C. C.—Page 1.

It is therefore held by the Board that respondent is not entitled to compensation.

In re HARRY HART.

MEDICAL SERVICES RENDERED MORE THAN THREE WEEKS AFTER ACCIDENT.

Claimant was injured while in the exercise of his ordinary duties, but serious effects did not develop until more than eight weeks after the accident occurred. Payment for medical and hospital services was disputed on the ground that such services were rendered more than three weeks after the accident.

HELD: 1. Sec. 4, Part II, of the Compensation Act, an employer shall furnish the injured employe medical and hospital service

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not exceeding three weeks in point of time, and the commencement of such service should be at the time the injury requires it.

2. The words, "injury" and "accident" as used in the act are distinguished thus: the "accident" is the *cause* of the "injury" and the time is computed from the date of the injury resulting from an accident.

Opinion by the Board:

The question as to the liability of an employer to pay for the hospital and medical services furnished the injured employe is involved in this case. The employe, Harry Hart, on November 16, 1912, while acting in the course of his employment, caught hold of and attempted to stop a barrel of sugar which was rolling down a slight incline. His effort in stopping it caused a strain or rupture in the groin. He experienced some pain at the time, but it did not appear to be serious, and he kept on at work until January 6, when the hernia became more clearly developed and its condition so serious that it necessitated an operation. The operation was succesful and he returned to work three weeks after the sixth of January fully recovered. The doctor's bill for the operation is disputed by the employer upon the ground that it was incurred more than three weeks after the injury.

The determination of this question involves the construction of Section 4, Part II of the Compensation Act, which is as follows:

"During the first three weeks after the injury the employer shall furnish, or cause to be furnished, reasonable medical and hospital services and medicines when they are needed."

The claim is made on the part of the employer that the injury having occurred on November 16, the three weeks during which medical and hospital service is required to be furnished commenced on that date, and such three weeks' period had expired before any part of the medical and hospital service claimed for in this case was rendered. In the opinion of the Board it is the clear intent of the law that in all cases the

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employer shall furnish the injured employe hospital and medical service if the injury requires such, but not exceeding three weeks in point of time. That the commencement of such service to be furnished should be at the time when the injury requires it, which in a vast majority of cases is immediately following the accident. There are, however, certain kinds of accidents where the injury or disability does not develop or become serious until some time after the accident occurs and the medical and hospital service in this class of cases is not required immediately after the accident, but becomes necessary at a later time. It seems apparent that it was not the legislative intent to deprive persons sustaining injuries of the kind last above mentioned of such medical and hospital service for the mere reason that the disability did not immediately follow the accident; and from a careful examination of the language of the statute we are of the opinion that such construction is not required. The language used in the statute is "during the first three weeks after the injury." The word "injury" in its ordinary signification is distinguished from the word "accident," and differs materially from it in meaning. The word "accident" is generally used to designate the cause, and the word "injury" is used to designate the effect. The effect of the accident, (which is the injury) may be and generally is immediate, but in a considerable number of cases the effect of the accident (which is the injury) does not immediately follow in point of time, but develops and produces disability at a later time, in some instances weeks or months after the accident. It is apparent that if we give the word "injury," its ordinary significance as distinguished from accident, the "first three weeks after the injury" would commence to run from the time the accident in cases like this produces the actual disability requiring medical or hospital service. We hold in this case that such service should be paid for by the employer.

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SUPREME COURT.

JOHN KENNELLY,
Applicant and Appellee,
vs.
STEARNS SALT & LUMBER COMPANY,
and NEW ENGLAND CASUALTY COMPANY,
Defendants and Appellants.

EMPLOYMENT—EXTINGUISHING FOREST FIRE UNDER ORDER OF STATE FIRE WARDEN.

Applicant, an employe of the Stearns Salt & Lumber Company was working with a gang of men constructing a logging railroad, when he and his co-laborers were ordered by the fire warden to aid in extinguishing a forest fire. While engaged in fighting this fire, applicant was struck by a falling tree and the sight of his left eye destroyed.

HELD: That at the time of the injury he was not engaged in his regular employment, but was working for the state under the direction and authority of the fire warden.

Certiorari to the Industrial Accident Board to review the action of that Board in awarding compensation to John Kennelly for injury received while in the employ of the Stearns Salt & Lumber Company. Reversed.

John C. Myers, of Detroit, Attorney for Applicant.
Frank J. Riggs, of Detroit, Attorney for Defendants.

BIRD, J. While claimant was in the employ of the defendant, the Stearns Salt & Lumber Company, with a gang of men constructing a railroad, he with several of his co-laborers was ordered by the Fire Warden to go with him and assist in extinguishing a forest fire. The claimant complied with the order, and while engaged in that work, he was struck by a falling tree, and the sight of his left eye was destroyed. He pre-

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sented his claim to the Industrial Accident Board as a servant of the Stearns Salt & Lumber Company. The Board of Arbitration allowed his claim at $5.02 per week for one hundred weeks. Subsequently, on appeal this award was approved by the Industrial Accident Board. Defendant insurance company has removed the proceedings to this court by certiorari, claiming that the award should not have been made, because claimant at the time of his injury was engaged in work for the State, and not for the defendant, Stearns Salt & Lumber Company.

Counsel for claimant insist that that question was one of fact, and the fact having been found by the decision of the Board, it is not reviewable in this court.

(1) The real question presented is whether there is any testimony in the record to support the finding of the Board. The testimony is brief, and is set out in the record and there is no disagreement concerning it. It shows that while the claimant was engaged in work for the Stearns Salt & Lumber Company, the Fire Warden came along and ordered him to go with him to assist in extinguishing a forest fire. The record shows that he was not only ordered to go by the Fire Warden, but that his work was directed by the Fre Warden after he arrived there. It is further shown that he was paid his regular wages by the Stearns Salt & Lumber Company, and that it was reimbursed by payment from the state and county, as the law provides in such cases. Section 6 of Act 249 of the Laws of 1903 as amended by Act 317 of the Laws of 1907, confers upon the Fire Warden the following authority:

"It shall be the duty of each Fire Warden to take precautions to prevent the setting of forest fires, and when his district is suffering or threatened with fire, to go to the place of danger to control such fires, and each forest fire warden shall have the authority to call to his assistance in emergencies any able-bodied male person over eighteen years of age, and if such person refuses, without reasonable justification or excuse, to assist, * * * * he shall be deemed guilty of a misdemeanor and shall upon conviction thereof, be punished

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by a fine of not more than $100 or imprisonment in the county jail not to exceed three months."

This provision of the statute clearly authorizes the Fire Warden to exercise the power which he did on this occasion. We do not think it can be said that while claimant was engaged in this service he was engaged in his regular employment. He was ordered by a state officer to leave his work and go to the assistance of the State. After he arrived there he was directed by a State officer, and for his time spent in such work he was paid by the county and State. It would hardly be contended that if he were impaneled to sit on a jury and had met some accident while engaged in that service his employer would be liable therefor. Nor could that contention be made had claimant been injured while assisting the sheriff at his command in quelling a riot. We think this situation is no different. When he was ordered to go with the Fire Warden, he left his work temporarily to discharge a duty which was incumbent upon him as well as upon every other citizen similarly situated. We do not think it can be said that his injury arose out of his employment or during the course of it. The testimony does not support such a finding.

Some point is made by claimant that he was paid his regular salary by his employer for the time spent in fighting fire. We do not regard this as of importance as the record explains that it was done as a matter of convenience and that his employer was afterwards reimbursed from the public funds for his services. Some point is also made because his foreman or superintendent directed some of his acts while at the fire. This quite likely was the result of habit, rather than of authority upon the part of the foreman or superintendent. The claimant's own testimony shows that his work was directed by the Fire Warden.

The conclusion of the Industrial Accident Board must be reversed and the award set aside.

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SUPREME COURT.

JAMES F. ROBBINS,
Applicant and Appellee,
vs.
ORIGINAL GAS ENGINE COMPANY
and
ZURICH GENERAL ACCIDENT and LIABILITY INSURANCE COMPANY,
Respondents and Appellants.

HERNIA—ACCIDENT WITHIN THE MEANING OF THE COMPENSATION LAW.

Applicant with the assistance of another man was moving a gasoline engine weighing some 600 pounds, this being a part of his regular work. He was suddenly and accidentally put at a disadvantage in moving the engine by the act of his fellow workman and the sticking of the engine on the concrete floor, and the rupture and immediate protrusion of the abdominal sac were caused by his efforts to retrieve his position and do his work.

HELD: An injury by accident within the meaning of the Workmen's Compensation Law.

Certiorari to the Industrial Accident Board to review the action of that board in awarding compensation to James F. Robbins for injuries sustained while in the employ of Original Gas Engine Company. Modified.

Shields & Silsbee, of Lansing, for appellant.

Clark, Lockwood, Bryant & Klein, of Detroit, for respondents.

OSTRANDER, J. It is the contention of respondents, plaintiffs in certiorari, that the testimony fails to prove accidental injury. The testimony introduced on the part of claimant tended to prove that on January 22, 1915, while he assisted another in moving a gasoline engine weighing some 600

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pounds, he suddenly had pain in his left groin, noticed a small swelling in the groin that night, consulted a physician, was advised that he had a hernia and was operated upon for hernia. His claim is for compensation for time lost from February 6, 1915, to April 5, 1915, for medical attendance, hospital and ambulance fees, a total of $167.08. This mount was allowed by arbitrators, and, upon appeal, the allowance was affirmed.

Claimant had worked for the Original Gas Engine Company for about nine years, painting gasoline engines. For three years the conditions under which he worked and the method of doing the work were the same. Claimant described the injury, as well as the conditions, as follows:

"Q. What happened, Mr. Robbins?

"A. Well, in the course of painting the engines, we have to wash the grease off, and where we wash them there is a slope down to a drain, and pulling that engine up out of there, putting it where we are going to paint them,—a man takes hold of each side of the engine, on the shaft, pulls them up out of there.

"Q. And the engine stuck?

"A. Naturally, on the hump there. Two of us were working on the engine, Mr. Carr, the gentleman here, and myself. In order to move the engine Mr. Carr would take hold of one shaft in a stooping position. On the 22nd day of January when we were pulling the engine up out of there, Mr. Carr had the long end of the shaft and I had the short end, gave him a little advantage but we don't look at that. Any way my side seemed to get behind and I used extra effort to start it and at that time I felt pain.

"Q. Just describe, if you will, the position you were in, what doing, and where the pain was?

"A. Well, we were stooping over, in a stooped position (indicating), pulling, and the pain shot up across my side of my body in the groin. As near as I can figure, the engine we were pulling weighed somewhere in the neighborhood of 600 pounds. I have never previously suffered similar pain in the region of my groin. I have never had any attacks similar to what developed after this pain. The pain I suffered was simply a pain that shot around there and I felt weak afterwards. I did not do anything concerning the pain immediately, but noticed it once in a while. I looked my body over that night to see whether there was any injury and I noticed a small swelling in the left groin. This swelling was not there when I went to work that morning. I do not know of anything that occurred to me that would have caused the swelling, except this strain and lifting

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the time I felt the pain. When I discovered the swelling I was worried about it and consulted Dr. F. A. Jones, that would be on Saturday evening. He did not make any investigation of my body at that time, although I described the sense of pain that I had and the swelling. He did not see the swelling that night, neither did he prescribe anything for me. He said, I don't remember the doctor's exact words, something to the effect that a cold had settled in the glands and it would pass away in a day or two. I went back to the same doctor again on Monday after that Saturday night. I worked Saturday and the following Monday, I went back to the doctor because the swelling was larger. The doctor at that time made an examination and said that I had hernia."

On cross-examination he testified:

"Prior to January 22nd, 1915, I did not have a hernia. I know what a hernia is in a way. It is the breaking of the lining of the stomach, and while I don't really know whether I had a hernia before or not I never had any pain or swelling down there. Never had any trouble there.

"Q. You don't know whether you had a hernia or not?

"A. Well, according—if that is what I had, I never had one before. I have been employed with the Original Gas Engine Company for almost nine years.

"Q. And how long had you been doing this particular class of work?

"A. Ever since I have been there.

"Q. The very same kind of work?

"A. Exactly. The conditions of the factory during the nine years period was not exactly the same as on January 22nd, 1915, 'cause the Original Gas Engine Company have moved into these quarters about three years ago and previous to that time, of course we did not have the same floor to work on.

"Q. Then for three years you had been doing the work in the exact manner you were doing the work under date of January 22nd?

"A. (Witness nods yes.)

"Q. The engine weighed, you say, in the neighborhood of 300 to 600 pounds?

"A. Somewhere in the neighborhood of 600.

"Q. You have been handling the same make of engine right along?

"A. Yes; of course you understand these engines are not the same size.

"Q. And when you were lifting the engine on this particular day, at this particular time, you merely felt a pain?

"A. A sharp pain, yes.

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"Q. That was all out of the ordinary that happened at that time?
"A. Yes. * * * *
"Q. You were doing the same class of work you had been doing for nine years?
"A. Yes, sir.
"Q. There was nothing whatever out of the ordinary that you did on that particular day?
"A. No, sir."

And on redirect:

"Q. Mr. Robbins, do you ever remember any other occasion where any engine weighed as much as this one stuck and you had to exert yourself as you did in this case to move it?
"A. I couldn't state any particular case, but there has been engines—it is a cement floor, and cast iron has a tendency to stick.
"Q. Had it occurred before that day at all, that you remember?
"A. Well, I presume there has been engines sticking down there, but I couldn't name any particular time.
"Q. Could you say for sure whether they stuck so you had to exert extra strength?
"A. I couldn't do it."

The history of the particular case excludes the idea of the use, with violence, of an instrument, or substance, puncturing or rending the abdominal wall.

A physician, the one first consulted by claimant, testified that in his opinion the hernia was caused by the strain in moving the engine. He further testified that when he first examined claimant he was able to reduce the hernia with his finger; that there were no adhesions. In these circumstances he found support for his conclusion that this was a new and not an old hernia. The surgeon who operated upon claimant testified that in his opinion the hernia was produced by the exertion described by claimant. All the experts seem to agree that the visible evidence of the hernia is the protrusion through the inguinal ring of the peritoneum and its contents:

"the hernia is the peritoneum going through, accompanied by the intestines or some other substance."

But the testimony for respondents is to the effect that the peritoneum is incapable of sudden, and is capable of very

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gradual, extension, that the sudden complete development of hernia in a pathological sense is impossible, but the hernia may be felt—the sudden projection of hernial contents into the performed sac—for the first time during a straining effort. Various medical authorities to which the court is referred appear to sustain the proposition that hernia is of slow formation and can never arise from a single augmentation of intra-abdominal tension, however great it may be. It may be said that the testimony of claimant's experts does not deny this proposition; that they regarded the condition which they found—the condition they undertook to relieve—as caused by the strain and exertion of the claimant. They found a hernia, a protrusion, to be reduced, and found cause for it in the described strain and exertion of claimant.

The Michigan law does not award compensation for all personal injuries suffered by an employe, but for accidental injuries only. Adams v. Acme White Lead, etc. Works, 182 Mich. 157. The vital question which the Industrial Accident Board had to determine was not whether on January 22, 1915, it was discovered that claimant had hernia, but was whether claimant on that day suffered an accidental injury, arising out of and in the course of his employment. Accepting respondents' proposition as true, it may be said that upon the occasion in question, by reason of a strain, or effort, of claimant, in performing his duties, an undiscovered and undiscoverable, but previously formed, sac was pushed through the left inguinal ring and muscles. So much injury claimant then and there suffered, to alleviate, if not to cure which, medical attention and treatment were required. It is compensation for that injury which is claimed and was allowed. Was it an accidental injury within the meaning of the law? It has been said of the expressions "accident" and "accidental," employed in an act having a purpose similar to ours, that they were used with their popular and ordinary meaning. Happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected.

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"If a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but if in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means." Mut. Benefit Asso. v. Barry, 131 U. S. 100, 121.

This is a case relied upon by respondents.

It has been held that death resulting from a ruptured artery was not accidental when the rupture occurred while the insured was reaching from a chair to close a window, did not slip or fall or lose his balance and nothing unforeseen occurred except the bursting of the artery. Feder v. Iowa State Trav. Men's Asso., 107 Iowa, 538. An examination of cases arising principally upon accident insurance policies, some of which are collected in a note to Lehman v. Great Western Acci. Asso., 42 L. R. A. (N. S.) 562, discloses that in the opinions which seem to be best considered the distinction is observed between the means by which an injury is produced and the result of the producing cause or causes. It is not sufficient that there be an unusual and unanticipated result; the means must be accidental—involuntary and unintended. There must, too, be some proximate connection between accidental means and the injurious result. It is doubtful, however, if in applying our statute, its general purpose being considered, the court should exactly follow the rules suggested and applied in the cases referred to. The statute seems to contemplate that an accidental injury may result by mere mischance; that accidental injuries may be due to carelessness, not wilful, to fatigue, and to miscalculation of the effects of voluntary action. There is testitmony in the record, although it is not very conclusive, to support a finding that claimant was suddenly, and accidentally, put at disadvantage by the act of his fellow workman and the sticking of the engine on the concrete floor, and that the rupture and immediate protrusion of the abdominal sac were caused by his efforts to retrieve his position and do his work. It is assumed that it was the first time the sac had been forced through the abdominal wall. If

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it is also assumed that there was a certain lack of physical integrity in the parts where the injury was manifested, still I think claimant may have compensation for the injury he suffered. I decide only the particular case, and in doing so decline to hold, upon this record, that claimant suffered from disease and not from accidental injury. See, Grove v. Michigan Paper Co., 184 Mich. 449.

The method employed by the Board to ascertain the amount of claimant's wages is questioned. Claimant had been employed by the Original Gas Engine Works for nine years. During the period from February 6, 1914, to February 6, 1915, he worked the entire time except seven weeks—42 working days. His wages were $19.50 per week. He earned and received $790.15 during the year. The average weekly wages actually earned during the year was $15.20, one-half of which is $7.60. But claimant was awarded $8.76 a week, or an average weekly wage of $17.52. It was ruled that, having lost seven weeks, claimant had not worked substantially the whole year, in the same employment, immediately preceding his injury and that 300 times the average daily wage was the average annual earning. The statute, so much of it as is material, provides:

"Sec. 11. The term 'average weekly wages' as used in this act is defined to be one fifty-second part of the average annual earnings of the employe. If the injured employe has not worked in the employment in which he was working at the time of the accident, whether for the employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he has earned in such employment during the days when so employed. If the injured employe has not worked in such employment during substantially the whole of such immediately preceding year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employe of the same class working substantially the whole of such immediately preceding year in the same or a similar employment in the same or a neighboring place, shall have earned in such employment during the days when so employed. In cases where the foregoing methods of arriving at the average annual earnings of the injured employe cannot reasonably and fairly be applied, such annual earnings shall be taken at such

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sum as, having regard to the previous earnings of the injured employe, and of other employes of the same or most similar class, working in the same or most similar employment, in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employe at the time of the accident in the employment in which he was working at such time."

Claimant had worked in the employment, that is, in the capacity and line of work in which he was working at the time of his injury, for many years—not only substantially, but wholly. It was therefore manifestly improper to employ the factor of average daily wages in determining the average weekly and annual wages. It is obvious, too, that the average annual wages of one employed for years in the same capacity and line of work cannot be determined except by comparing the wages of two or more years. A man may change his employment or the capacity in which he follows it. If he has done this at a time substantially less than a year before his injury, then the statute fixes three hundred times his average daily wages as his average annual wages. For the man who works for years in the same employment and is injured, the statute fixes average weekly wages at one fifty-second part of his average annual earnings. This is the rule which should be applied in this case. The record does not supply the information required to make a finding.

It is assumed that the parties in interest can easily ascertain and agree about the annual earnings of claimant for a period of at least three years. It is, of course, possible that the award made is substantially a correct award, but, the rule applied being inapplicable, it must be set aside.

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SUPREME COURT.

PATRICK FOLEY,
Applicant and Appellee,
vs.
DETROIT UNITED RAILWAY,
Respondent and Appellant.

REOPENING CASE—AUTHORITY OF BOARD—TEST IN DETERMINING DISABILITY.

Applicant was employed by respondent as motorman, and on July 22, 1913, suffered a compound fracture of his left leg above the ankle in a collision. Medical and hospital service was furnished and compensation paid for a time. In February, 1914, he was put to work as a watchman at respondent's car barn and signed a settlement receipt, which was filed with the Board. His injured leg was still disabled so as to prevent him from resuming his regular work as motorman, and by reason of certain misconduct he was discharged from his position as watchman at the car barn. He filed a petition praying that his case be reopened and that he be awarded further compensation, the petition being granted by the Board.

HELD: 1. That the action of the Board in reopening the case and granting further compensation was within its authority.

2. That the test in determining the question of disability is capacity to earn in the same employment in which the employe was injured.

Appellant seeks by writ of certiorari to review and reverse an order of the State Industrial Accident Board reopening applicant's case and awarding him additional compensation. Affirmed.

Beaumont, Smith & Harris, of Detroit, Attorneys for Applicant.

Corliss, Leete & Moody, of Detroit, Attorneys for Appellant.

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STEERE, J. Claimant was employed by respondent as a motorman working 10 hours per day at an average weekly wage of $16.25. On July 22, 1913, his car was in a collision which resulted in a compound fracture of his left leg above the ankle. He was at once taken to a hospital and there remained until February 17, 1914. While there he was paid one-half his average weekly wages and provided with doctors, special nurses when needed, medicine, general hospital attendance and his wants all supplied, at appellant's expense. When his condition became such that he said he was well enough to go back to work and desired to do so he was discharged from the hospital. He testified that he was kept there until he recovered and prior to his discharge he walked out for exercise, and "used to come down town and walk around lots of times." He returned to work on February 22, 1914, as a watchman at one of respondent's car barns, receiving $2.50 per working day of 9 hours each for 7 days in the week, which amounted to more than the wages he had been receiving as a motorman prior to his injury. While he was yet in the hospital, on September 16, 1913, an agreement for compensation was entered into between him and appellant in accordance with provisions of Act 10 Public Acts, 1912, extra session, using a form of the Industrial Accident Board as follows:

"AGREEMENT IN REGARD TO COMPENSATION.

We, Patrick Foley, residing at city or town of Detroit, Michigan, and Detroit United Railway, have reached an agreement in regard to compensation for the injury sustained by said employe while in the employ of Detroit United Railway, 12 Woodward ave., Detroit, Michigan, 8:50 p. m. July 22, 1913, Jefferson and Cadillac ave., Detroit, Michigan. Collided with car ahead when he ran his car too close to it. Leg broken.

The terms of the agreement follow:

$8.13 per week payable under act. Average weekly wage $16.25." (Duly dated, signed and witnessed.)

This agreement was approved by the Industrial Accident Board on the following form:

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"STATE OF MICHIGAN

INDUSTRIAL ACCIDENT BOARD

Oakland Building

Lansing

Members of Board: John E. Kinnane, Chairman, Bay City; Richard L. Drake, Secretary; J. A. Kennedy, Sault Ste. Marie; Ora E. Reaves, Jackson.

December 6, 1913.

IN RE D. U. R.: PATRICK FOLEY.

Detroit United Railway Co.,
Detroit, Michigan.

Gentlemen: The Agreement in regard to compensation in the above case has been passed upon by the Industrial Accident Board and app-oved.

Yours very truly,

Secretary.

Note: It is required by the Industrial Accident Board that receipts on Account of Compensation (Form No. 11) be taken when weekly payments are made, same to be submitted to the Board monthly. A settlement receipt (Form No. 12) will be signed when last payment is made and will be accompanied by Final Report of Accident (Form No. 7a). If above forms have already been submitted kindly disregard this clause."

On February 17, 1914, when claimant applied to return to work, he was paid in full the compensation then due him according to previous agreement and signed a receipt therefor, but he did not resume work until five days later, for which intervening time he was also paid on the basis of their agreement, after which he gave appellant a receipt in full as follows:

"SETTLEMENT RECEIPT.

Received of Detroit United Railway the sum of ($4.65) four dollars and sixty-five cents, making in all, with weekly payments already received by me, the total sum of ($248.55) two hundred forty-eight dollars and fifty-five cents, in settlement of compensation under the Michigan Workmen's Compensation Law, for all injuries received by me on or about the twenty-second day of February (July), 1914, while

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in the employ of Detroit United Railway, 12 Woodward ave., Detroit, Michigan, subject to review and approval by the Industrial Accident Board.

Witness my hand this 4th day of March, 1914.

Witness: Nell S. McDonald,
Detroit, Michigan.

Patrick Foley,
242 Lycaste St.,
Detroit, Michigan.

Being in addition to the settlement receipt signed by said Foley Feb. 17, 1914, he having been ready to work Feb. 18, but not actually starting to work until Feb. 22, 1914."

The $248.55 paid claimant for the intervening time between his injury and resuming work was clear to him and in addition to all expenses of his care and medical attendance which were assumed and paid by appellant.

On April 17, 1913, claimant filed a petition with the Industrial Accident Board, reciting briefly the facts of his injury, the compensation and care received until discharged from the hospital, his resumption of work as watchman for appellant, stated that in attempting to perform his duties in that capacity his leg became swollen at the end of the day's work and was so weak that he was unable to walk any great distance or be on his feet any great part of the day and—

"That he consulted an eminent physician in the city of Detroit, who states that while the results obtained by the Detroit United Railway's physician have been good, still the injured leg, as a result of the aforesaid injury, is now one-half inch shorter than the other leg, and that your petitioner will not be able to follow any occupation in which it will be necessary for him to be on his feet any great portion of the day, or in which much walking or lifting is required."

For which reason he asked the Board to adjudge him further compensation.

The return of the Industrial Accident Board to this writ of certiorari does not traverse nor deny the facts stated in appellant's affidavit on which the writ was allowed. It briefly states that claimant made application for a reopening of the case and an award of further compensation; that testimony was taken thereafter by deposition at the instance of both

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parties, after which a hearing was had on July 8, 1915, and the award complained of was made. "A resume of such testimony," copies of claimant's petition and the order of said board are attached to said return as exhibits and part of said return. Counsel for the respective parties also stipulated in writing to the same as "the return of said Board," with exhibits attached to the affidavit for writ of certiorari considered as a part thereof. The material parts of those exhibits (3 in number) are quoted above. No findings of fact or conclusions of law are returned and, so far as shown, none were made or filed by the Board.

Appellant's two principal contentions against the validity of this order are that the agreement between the parties after being approved by the Board was "final and binding" under the statute and the Board had no authority to re-open the case after claimant had signed a final settlement receipt in full, "in the absence of fraud, duress or mistake being alleged and proven as a basis for such re-opening," and—

> "That there is no evidence in the record which would warrant an award to claimant of any further compensation as it is undisputed that at the time of the filing of the petition claimant was earning in respondent's employ in a shorter period of time, an amount equal if not greater than that earned by him prior to the accident."

The act clearly favors and contemplates an agreement between the parties as to compensation in case of an industrial accident and that the Board in its supervisory control shall favor and approve such agreements when understandingly made, without fraud, duress or undue advantage. (Section 5 part 3). An attempt to reach such an agreement is a prerequisite to an application to the Board for an arbitration and award. (Section 6 part 3). It is questions arising under the act, "not settled by agreement," which the Board is authorized to determine, except as otherwise provided. (Section 16 part 3). Section 14 of part 3 provides:

> "Any weekly payment under this act may be reviewed by the industrial accident board at the request of the employer, or the in-

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surance company carrying such risks, or the Commissioner of Insurance as the case may be, or the employe; and on such review it may be ended, diminished or increased, subject to the maximum and minimum amounts above provided, if the board finds that the facts warrant such action."

At the time the agreement in regard to compensation, which the Board approved, was entered into claimant was lying in the hospital totally incapacitated for work as the result of a compound fracture of his left leg sustained while in appellant's employ. Under Sec. 9 part 3 of the act he was entitled to receive from his employer one-half his weekly wages while his incapacity for work resulting from the injury was total, not to exceed 500 weeks. This agreement stated his average weekly wages and provided he should receive one-half of that amount "per week payable under act." This was just what the law provided as applied to the undisputed facts and then existing conditions, and nothing more. It did not specify how long such weekly payments should continue, though an intent to cover the period of total incapacity might be inferred. So far as it went it was according to law and fixed a weekly basis of compensation for the ascertained total incapacity. This the Board approved. But it made no provision for the unascertained future partial incapacity which might follow the total, or for any lump sum which should be paid in final settlement.

The approval by the Board of this manifestly incomplete agreement, in view of the time when made and the nature of the injury, did not divest the Board of jurisdiction nor deprive it of its general supervisory powers in material matters necessarily left open for adjustment before final disposition of the case. The settlement receipt in full, given by claimant before he resumed work, is not shown to have been filed with or approved by the Board. Had it been, a different question would confront us under said sec. 5 part 3 of the act.

The last matter in the case brought to the attention of the Board, so far as shown, before claimant filed his petition for additional compensation under a claim of partial incapacity,

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was an agreement for weekly payment under the act on a basis of total incapacity, which it approved. Section 14 part 3 gives the Board the right, if it finds that the facts warrant such action, to end, diminish or increase "any weekly payment under this act." It is said the parties interested had settled this question by agreement, as evidenced by the settlement receipt claimant signed, but to "be deemed final and binding upon the parties thereto" under the act it was necessary that it should be filed with and approved by the Board.

Defendant's second contention is that, if it be found the Board had authority to reopen the case, no award could be made by it for further compensation as it is conceded claimant at the time of filing his petition, and when the testimony was taken as to his physical condition, was and had been since February 22, 1914, earning as much or more wages than he did before the accident causing his injury, and sec. 10 part 2 of the act provides:

"While the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employe a weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, * * * * * * * * * *."

If this were the only and controlling provision in the act upon that subject appellant's contention could not be questioned; but the last sentence of the next ensuing section (11), which concludes a long series of provisions in it and preceding sections classifying injuries, treating total and partial incapacity, specifying and defining weekly rates, time payments shall continue, amount of compensation, methods of arriving at the same, etc., is as follows:

"The weekly loss in wages referred to in this act shall consist of such percentage of the average weekly earnings of the injured employe, computed according to the provisions of this section, as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, but to be determined in view of the nature and extent of the injury."

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Appellant urges that the provision is directly contradictory of Sec. 10 and an interpolation which means nothing, as "weekly loss of wages" is not mentioned in the act. While not referred to in exact language, in substance it is inevitably connected with and treated in what goes before touching compensation for incapacity resulting from the injury.

Although this provision is apparently restrictive, we do not find it directly contradictory of Sec. 10, and if it were, being the last of the two provisions it should prevail under the general rules of construction, provided either must be disregarded. The language of this last provision is plain, and has but one obvious meaning, designating as the test capacity to earn in the same employment in which the employe was injured. That under this rule instances may arise where it works inequitably does not authorize the court to read exceptions into it or modify its plain language defining the basis for estimating incapacity, which at best can only be approximated. If the method ought to be changed or exceptional cases provided for the remedy rests with the legislature.

A ready disposition of this case is embarrassed by total absence of any findings of fact by the Board, which the statute appears to contemplate though not in express language commanding; (sec. 12 part 3). Counsel have stipulated to the return as satisfactory and "a resume of such testimony" with the order of award made by the Board have been passed up for this court to help itself to what it can find. Technically the order contains an implied finding of facts legally sufficient to support it and in that view the court may search the testimony to ascertain if the necessarily inferred facts presumptively found have evidential support. The dates when the testimony was taken are not disclosed though it appears to have been taken at intervals between the time of filing claimant's petition and the hearing and most of it while claimant was in appellant's employ. But when recalled for further examination some weeks later, near the conclusion of the proofs, claimant disclosed that he had been "let go" about the time he "blackened this fellow's face," which episode re-

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sulted, as he stated, in his taking a ride to the county jail in a patrol wagon, where he asserts, however, he was only detained from Saturday night until 2 o'clock Sunday afternoon. It is stated without denial in appellant's affidavit that an investigation of charges made by county officials and a "passenger upon whom he had committed a trespass" led to claimant's discharge from its employ. Just what appellant claims for the fact that claimant had misbehaved and been discharged is not clear, and what weight the Board gave the fact he was not shown to be employed at the time of the hearing is not apparent. It would be equally competent to show that after claimant filed his petition appellant had arbitrarily discharged him, if such were the fact. In either case his incapacity to engage in the employment in which he was working at the time of the accident would be the same, and the possibility of either contingency but illustrates that the rule appellant contends for is also fallible, and open to contingencies which might operate inequitably.

To sustain its award the Board must have been able to find from competent testimony a continuing partial incapacity to properly perform the work of a motorman, in which claimant was engaged at the time of the accident. There is testimony tending to sustain such a finding. Aside from claimant's own testimony as to continuing pain, weakness and swelling in his leg which rendered it difficult for him to be upon his feet long and get around readily, the physicians called by both sides agree that he had a shortening of the leg of from an half to three-quarters of an inch which would be permanent, and that otherwise it would be months if not years before it would be strong and normal, if ever; that in its condition at the time they testified the lost percentage of normal use and strength was from 25 to 75. Dr. Dolman, the physician who attended and operated upon claimant at the time of the accident and cared for him until he was discharged from the hospital, called as a witness by respondent, testified the broken limb was so seriously injured that "under usual circumstances, the injury would undoubtedly have caused him to lose his leg

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by amputation;" that he however decided to perform an operation and try to save the limb, which started to improve some five weeks after the operation and ultimately made a very successful recovery; that the injured leg was about half an inch short and the impairment of function at the time witness was testifying was presumably 25 per cent, and not more than 33 1-3; that when claimant left the hospital he "was able to walk about on his leg with difficulty. He could put his foot down and bear his weight on the broken limb;" that perfect union was not restored and circulation had not fully established itself in the leg; witness would say it would re-establish itself so that claimant would be able to work eventually as a laborer, in perhaps a couple of years. The testimony of physicians called by claimant was somewhat along the same lines but on the whole tending to show a greater degree of impairment than that of Dr. Dolman, and touching his ability to work as a motorman was to the effect that his condition would detract from efficiency and it would be difficult for him to work in that capacity successfully, various reasons being given therefor.

The agreement approved by the Board only provided for a weekly payment of indefinite duration, which was discontinued without its approval. Under such circumstances we conclude authority yet remained with the Board to review the matter of weekly payment and diminish, or approve of ending the same, as it found the facts warranted, as provided in Sec. 14 part 3 of the act; and having such authority its order has support in testimony tending to sustain facts essential to its validity.

Its order is, therefore, affirmed.

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SUPREME COURT.

GEORGE BISCHOFF,
Applicant and Appellee,
vs.
AMERICAN CAR AND FOUNDRY COMPANY,
Defendant and Appellant.

COURSE OF EMPLOYMENT—ARISING OUT OF.

Applicant was employed as a moulder in respondent's plant, being in charge of one of the "floors," consisting of a row of moulds. About 15 feet above the floor was a crane run by electricity and operated backwards and forwards and up and down by applicant, as might be necessary in his work. The crane got out of order on the day of the accident and applicant notified the electrician whose duty it was to make repairs. The men spoke different languages and applicant, being unable to satisfactorily explain the trouble to the electrician, went up onto the crane to point out the trouble to him. In some way the crane was set in motion, catching plaintiff's hand and practically destroying it.

HELD: That applicant went outside the limits of his employment by climbing upon the crane, and compensation denied. JJ. BIRD, KUHN, and MOORE, dissenting.

Certiorari to the Industrial Accident Board to review the action of that Board in awarding compensation to George Bischoff for injuries received while in the employ of the American Car and Foundry Company. Reversed.

Barbour, Field & Martin, of Detroit, for Applicant.
Angell, Bodman & Turner, of Detroit, for Defendant.

PERSON, J. On the 16th day of September, 1913, the claimant was, and for more than a year had been, employed by the American Car and Foundry Company, as a moulder. In the forenoon of that day his right hand was caught in the gear wheels of an electric crane and so crushed as to require the

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amputation of the larger portion of it. The committee of arbitration appointed under Act No. 10 of the Public Acts of the Extra Session of 1912, having found the claimant entitled to compensation, and the amount of such compensation having been increased on appeal to the Industrial Accident Board, the employer brings the case here for review, insisting that the injury received by the employe did not arise "out of and in the course of his employment;" that it was the result of his own "intentional and wilful misconduct," and that the compensation allowed is excessive.

As this Act provides compensation only for such injuries as are received in the course of the employment, and then only when they grow out of the employment, and as injuries received outside the employment are not within the provisions of the Act at all, it must follow that the "intentional and wilful misconduct" which operates to debar the employe from the compensation which he might otherwise receive, refers to such misconduct within the scope of his employment. If the injury to the employe was not received "in the course of his employment," it is immaterial whether it was caused by his "intentional and wilful misconduct," or not.

The first question, therefore, to be determined, is whether the injury received by claimant arose out of and in the course of his employment. And in this connection the findings of fact made by the Industrial Accident Board and returned to this court, being well supported by the evidence are controlling so far as they go. Such findings are as follows:

"1. On the 16th day of September, 1913, George Bischoff, claimant and appellee was employed as a car wheel moulder at the Detroit plant of the American Car & Foundry Company, a New Jersey corporation, engaged in the manufacture of cars, car wheels, etc. He was at that time twenty-nine years of age and had been in the employ of the appellant three and one-half years, two of which he had spent working as helper to a moulder and one and a half of which he spent working as a moulder.

"2. The foundry in which appellee worked at the time of the accident was divided into fourteen 'floors' about nine feet apart. Each 'floor' consisted of a row of moulds, 25 moulds in length, located on one level or general ground floor of the foundry. A moulder was in

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charge of each one of these 'floors.' At a distance of about fifteen feet above each 'floor' was located a crane, the motive power of which was electricity, 240 volts being required to operate it. Appellee was in charge of a 'floor' over which was located crane No. 8, three photographs of which were introduced in evidence as appellant's Exhibits 'A, B, C.' From the floor appellee, as part of his work, operated the crane forward and backward and up and down as might be necessary in doing his work. The crane could be reached only by climbing a brace located near it or by a ladder which must be especially placed for the purpose.

"3. There is nothing in the occupation of a moulder which would require him to go upon the crane for the purpose of repairing it should it be out of order, a machinist and electrician being employed by appellant to make the necessary repairs. Appellee understood that he was employed as a moulder and in no other capacity. That all his duties relative to such employment were ordinarily to be performed on the floor, that he must use the crane to do his work; that if the crane was out of order and he could not use it or operate it, he should report it to the machinist or electrician and if they could not be found be should sit down or go home.

"4. Instructions had been given by the superintendent to the foreman to allow no one but the men designated for such work to go upon the crane, and these instructions had been given to the moulders by the foreman, but appellee could not speak nor fairly understand either English or the language of his foreman. Appellee had in fact gone up to fix or oil the crane several times before the date of his injury.

"5. A short time before the injury, appellee discovered that the crane was out of order and reported to the machinist, who was also a foreman, that the crane was not working well, because the brake was too loose. Appellee is a German and the machinist is a Croatian; appellee could not talk with the machinist very well, because they did not speak the same language, yet he could indicate in broken English that 'the brake is too loose,' and by showing the machinist say enough in English to inform him what the trouble with the crane was.

"6. While the machinist was up on the crane looking for the trouble, appellee not being able to make him fully understand in English, went up the ladder and got off where the machinist was, to point out to him where the trouble was.

"7. After being on the crane five minutes appellee started to go down the ladder. In some way the machinist, or appellee, set the machinery in motion and appellee's hand was caught in certain gear wheels and all that part including the four fingers was amputated from a point on the metacarpal bone of the little finger about an inch

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and three-quarters below the wrist joint diagonally across the hand to a point two and a half inches below the wrist joint, leaving the thumb entirely uninjured.

"8. It was mutually conceded by the parties, that, if appellee is entitled to anything, he is entitled to the maximum compensation of $10.00 a week."

If a workman is injured while voluntarily doing something quite outside the scope of the work he is employed to do, it cannot well be said that such injury "arises out of and in the course of his employment." This is illustrated by the old case of the boy who was engaged to hand balls of clay in moulds to a moulder, and was told not to touch the machinery; but having nothing to do for the moment, he did attempt to clean the machinery, and was injured. It was necessarily held that the injury did not "arise out of and in the course of his employment," Lowe vs. Pearson, W. C. C. 5. It was also held that the injury did not arise out of and in the course of the employment where a girl left her work to start an engine when the person whose particular duty it was to do so happened for the moment to be absent, Losh v. Evans & Company, 5 W. C. C. 17.

In other words the work which one is employed to do, when construed in a reasonably broad and comprehensive way does limit and mark out "his employment," within the meaning of the statute. Of course, the scope of such particular employment may be enlarged for the time being by the directions of some superior who has authority; and in the case of an actual emergency it may be held that any reasonable attempt to preserve the employer's property is within the general lines of an employe's duty. But, ordinarily, the scope of a workman's employment is defined by the things he is employed to do, and the things reasonably and fairly incident thereto.

Notice must be taken that a factory of today usually includes within the field of its operations many fairly distinct lines of work, from that of the roustabout engaged in the ordinary labor that almost any one may perform, to that of the expert mechanic which can be done safely by those only with

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skill and experience. The difference between these various kinds of work was always recognized by the common law, and it was held to be negligence for the master to require of the servant, without warning and instructing him, the performance of work outside of and more dangerous than that which the latter had contracted to perform. Such classification of work exists in the very nature of things, and as much under the statute as at common law. Its recognition is required by any proper organization of a factory, not only for efficiency, but as well for the purpose of guarding against accident and injury. And if a workman, when there is no emergency, should, of his own volition, see fit to intermeddle with something entirely outside the work for which he is employed, he ought not to be allowed compensation upon the mere plea that he thought his act would be for the benefit of his employer. That plea may be of value under some circumstances, but it cannot authorize an employe to voluntarily take upon himself the performance of work for which he was not employed.

In the case at bar the crane, in connection with which the accident occurred, was located on beams some 15 feet above the floor where the claimant was required to work. It could be reached only by use of a ladder to be obtained and placed for that purpose, or by climbing upon a brace which was not intended for such use. Its location was as separate and distinct from the floor where the claimant worked as if it had been in another room, or in another building. The crane was operated by electricity, and 240 volts were required for that purpose. It was dangerous to get upon it, or to intermeddle with it, as is stated repeatedly in the testimony and is shown by the accident itself. And this the claimant must have known as well as anybody. Two experts were employed by the company for the particular purpose of repairing the cranes if they should get out of order.

It is expressly found by the Industrial Accident Board, and we are bound by the finding, that the claimant understood he was employed as a moulder, and in no other capacity; and that there was nothing in the occupation of a moulder which

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would require him to go upon the crane for the purpose of repairing it should it be out of order. A more definite and explicit finding as to what was within the scope of his duties, and what was without such scope, could not well be made.

The Industrial Accident Board also finds that instructions had been given by the superintendent to the foreman to allow no one but the men designated for such work to go upon the crane, and that these instructions had been given to the moulders by the foreman. The superintendent testifies that one reason for these instructions was the safety of the moulders. It is true the Board also finds that the claimant could not speak nor fairly understand either English or the language of the foreman, but it makes no express finding as to whether the claimant did or did not actually and in fact understand these instructions. Whether the claimant really understood them or not, he certainly did understand from the foreman that he was to report to the machinist or to the electrician any defect in the operation of the crane, and if they could not be found that he should sit down or go home. This is found by the Board from his own testimony.

On the day of the injury the crane used by claimant in his work did not operate properly and he reported it to the machinist. It does not appear from the claimant's testimony that he had any difficulty in making the machinist understand the trouble with the crane. He says that he told the machinist that it was not good and that the brake was too loose. Thereupon the machinist got a ladder and climbed upon the crane to repair it. After the machinist had got upon the crane the claimant followed him up the ladder and also up on the crane. No communication whatever between the two had been attempted after the machinist had started up the ladder, and while the claimant was on the floor. In other words the claimant did not climb up to and upon the crane because of any failure to make the machinist understand anything he was trying to tell him at the time. What the claimant did, after getting upon the crane, was to point out to the machinist what claimant thought ought to be done in making the repairs. He

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did not, apparently, go up for the purpose of reporting the condition of the crane, but to suggest to the machinist what the latter ought to do to remedy the difficulty. The claimant appears to have fully understood the danger of being on the crane, because he says that as soon as he found the switch had not been opened he at once started to go down. In doing this he placed one hand upon the large wheel, when in some way the machinery was started, and his hand was crushed.

The very thing that the claimant attempted to do, was the very thing that the Industrial Accident Board has expressly found to have been outside the limits of his employment. The finding of the Board is—"There is nothing in the occupation of a moulder which would require him to go upon the crane for the purpose of repairing it should it be out of order, a machinist and an electrician being employed by appellant to make the necessary repairs. Appellee understood that he was employed as a moulder and in no other capacity." The very thing he did do was to climb upon the crane, not for the purpose of reporting that it was out of order, but to direct the machinist in the performance of his duty. And he did this, well knowing the danger to which he was subjecting himself. In the face of the express findings of the Board, which, as we have said, are warranted by the evidence, it does not help claimant any that on several previous occasions also he had gone outside the limits of his employment by climbing upon the crane.

The orders allowing compensation must be reversed and set aside.

BROOKE, OSTRANDER, STONE and STEERE, JJ. concurred with PERSON, J.

BIRD, J. (Dissenting). The sixth finding of fact of the Industrial Accident Board was:

"While the machinist was up on the crane looking for the trouble, appellee not being able to make him fully understand in English, went up the ladder and got off where the machinist was, to point out to him where the trouble was."

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This finding of fact seems to me to be justified by the record. Claimant did not go up on the crane to repair the defect in violation of the rules. He went there merely to point out the defect which he was unable to describe in words to the machinist. To do so was to hasten the repair of the machine, which ordinarily would be to the advantage of both claimant and master. I am of the opinion that claimant's conduct should not be characterized as "intentional and wilful misconduct." Neither am I of the opinion that we should hold that claimant, in going upon the crane, under such circumstances, was acting outside of the scope of his employment. The cases cited by Mr. Justice Person on this question were instances where the servant left his particular work and meddled with machinery with which he had nothing to do. The machine in the present case was operated by claimant. When it was out of repair his work stopped. He knew where the defect was; the machinist did not for the moment. In an attempt to point out the defect claimant was injured. His effort was made in furtherance of the master's business, and it should not deprive him of the award.

The finding of the Industrial Accident Board is affirmed.

KUHN, and MOORE, JJ. concurred with BIRD, J.

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SUPREME COURT.

MARY LINDSTEADT,
Applicant and Appellee,
vs.
LOUIS SANDS SALT & LUMBER COMPANY,
Respondent and Appellant.

CIRCUMSTANTIAL EVIDENCE.

Applicant's decedent was employed in a building called the "hog-house" in respondent's plant, his duties being to keep the sawdust and refuse passing into the conveyor which carried the same to the fireroom for use under the boilers. The refuse was brought from the mill into the hog-house by a conveyor which dropped it from a point about 53 feet above the floor, naturally forming itself into a conical pile and slipping down as the size of the pile increased. On the day of decedent's death, respondent's foreman went into the hog-house at 20 minutes to 3 o'clock in the morning and talked with decedent about 5 minutes he being apparently in normal health. At 5 minutes past 3, respondent's foreman returned to the hog-house, and not seeing decedent made search for him and found his body under the refuse, it being covered at the head by a depth of about 6 inches and at the feet to a depth of 36 inches. The evidence as to how decedent's death was caused was entirely circumstantial.

HELD: That the circumstances shown were sufficient to justify and support the conclusion of the Board that death was caused by a sudden fall of the refuse which covered the body and apparently caused death from suffocation.

Certiorari to the Industrial Accident Board to review the action of that board in awarding compensation to Mary Lindsteadt for the death of her husband while in the employ of Louis Sands Salt & Lumber Company. Affirmed.

Howard L. Campbell, of Manistee, for applicant.
P. T. Glassmire, of Manistee, for respondent.

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BROOKE, J. In this proceeding defendant reviews the determination of the Industrial Accident Board by the terms of which they are compelled to pay to the applicant the sum of $6.17 per week for a period of 300 weeks, as compensation for the death of one William Lindsteadt, husband of the applicant. The findings of fact and law made by the Industrial Accident Board follow:

"1. That the defendant, the Louis Sands Salt & Lumber Company, is a corporation with its principal offices and place of business in the City of Manistee, Michigan, and is and has been for a number of years engaged in the manufacture of lumber and salt at its mill and plant in Manistee, and was so engaged in carrying on said business on and before the 9th day of May, 1914.

"2. That a large part of the sawdust from the logs sawed in defendant's mill, as well as certain other refuse from said logs was used by said defendant as fuel under its boilers in its fire room for the purpose of generating steam for operating said plant and for this purpose said refuse was passed through a grinding hog at or near said saw-mill and said refuse after being so ground, was carried from said hog by a conveyor to a building nearby, designated and called a hog or fuel house, into which said refuse was dropped to the floor beneath, a distance of about 53 feet from said conveyor, which extended inside of said hog house about six feet and at the top of the same and near to the west wall thereof, said hog house being of wrought iron construction, and 30 feet wide and 50 feet long, and oval in shape.

"3. That said refuse carried into said hog house by said conveyor was removed therefrom to the fire room for use under said boilers by means of another conveyor underneath the floor of said hog house, by which said refuse was carried to said fire room; that said refuse coming into said hog house through said conveyor from the mill consisted of about one-third sawdust, the rest of said material being small pieces of wood and shavings as it was ground in said hog; that as said refuse fell from the conveyor at the top of said fuel house to the floor thereof it assumed a cone-shape, piling up against the west wall of said building and slanting toward the opposite wall thereof near the entrance to the same; that over the conveyor underneath the floor of said fuel house, which said conveyor extended along the east side or wall thereof, were several loose planks about three feet long and ten inches wide, which were moved forward in such a way as to permit the refuse in said building to fall by its own weight through the spaces between said planks and into the conveyor underneath.

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"4. That said refuse was usually damp, having come from logs which were taken out of the lake day by day and into the mill for sawing; that as said loose planks over said conveyor were removed, the said refuse fell into said conveyor by its own weight, thereby leaving a pile or bank of said refuse on each side of said conveyor which, as the volume of said refuse in said building decreased, would be scraped or raked into said conveyor by a man employed for that purpose; that said refuse was conveyed into said building during the day time while said sawmill was in operation and was carried out of said building to the fire room during the night by the night operations; that is, from six o'clock in the evening until six o'clock the next morning; that no refuse was coming into said fuel house at night.

"5. That the entrance to said fuel house is shown on the map or diagram which was marked Respondent's Exhibit A, and received in evidence upon the hearing of said cause before the Board of Arbitration, and it was conceded by counsel that said plat or diagram was substantially correct as to measurements and as to such other things as it pretended to show.

"6. That the deceased, William Linsteadt, had been employed in and about the defendant's mill for a period of three years and upwards prior to May 9th, 1914, and for 42¾ days prior to said date was employed by said defendant in said fuel house on the night shift and was so employed on May 8th and 9th, 1914; that said deceased was nearly 65 years of age and had been regular in his work during the said 42¾ days.

"7. That the work and duties of the deceased required him to keep said refuse in said fuel house passing and falling in said conveyor to be carried to the fire room for use under said boilers and for this purpose he was furnished a hook with which to scrape, pull or rake said refuse from said pile into the conveyor when the volume of the same had so diminished that it would not fall into said conveyor by its own weight; that the planks over said conveyor near the entrance or door of said fuel house were usually first remcved so that said refuse at or near that side of said building would first fall into said conveyor and as further planks were removed approaching further into said pile of refuse, the said refuse would continue to fall into said conveyor of its own weight, so that as the quantity or volume of said refuse diminished in said building the said deceased was required to pull, scrape or rake said refuse at the sides of said conveyor down into the same so that it would be carried by said conveyor to said fire room and that the said deceased during the night of May 8th and the early morning of May 9th was so engaged in performing the said duties in the fuel house.

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"8. That one Christ Radtke, foreman of the night shift at defendant's mill, went into the hog house at 20 minutes of three in the morning of May 9th, and talked with Lindsteadt about five minutes, who, at that time was standing over or near said conveyor raking said refuse into the conveyor, the floor at or near the entrance at that time being clear for a considerable space of said refuse, said refuse being about 8 feet high on one side of said conveyor and 3 feet high on the other side, and that the deceased then stood about 15 feet from the entrance door and apparently was in normal condition and health.

"9. That at five minutes after three, said Radtke returned to the fuel house with one Patulski and deceased was not then visible, his body was found by Radtke and Patulski a minute or two afterwards underneath said refuse with his head about six inches from the door and his feet about six feet from the door or entrance and about nine feet from where he stood when Radtke had last seen him alive about twenty minutes previous.

"10. That the deceased lay on his back with face upwards, his mouth was lightly open, with a chew of tobacco therein, into which sawdust had fallen; there was also sawdust in his nostrils, eyes and ears; there was about six inches of said refuse over his face and about 36 inches deep over his feet, the entire body being covered with said refuse; both legs were straight, one heel resting over or near a space between said loose boards, both arms were straight alongside of his body, the hook he had been using in his work lay near him in said refuse; the floor underneath his body was clear and free from sawdust and he was found to be fully clothed.

"11. That said refuse at, near or over the body of said deceased, showed no indications of any disturbance or any struggle on the part of deceased.

"12. That there was no injury, wound, cut, abrasion or external injury of any kind or nature upon the body of deceased.

"13. That the features, limbs or body of said deceased were not distorted in any manner whatsoever.

"14. That an inquest was held at the mill of defendant soon after the body was discovered and after said inquest said body was removed to undertaking parlors where at about 6:00 in the morning an arterial injection of standard embalming fluid was made into said body immediately after the face of the said deceased had been washed and shaved by one Cron, licensed embalmer.

"15. That the defendant company during the morning of May 9th, 1914, made three requests of the claimant and the family of deceased that an autopsy be held for the purpose of determining the cause of death of deceased which were denied and refused by said claimant and said family although the said defendant offered to pay the entire expenses of the same.

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"16. That application was made by the President of defendant's company, R. W. Smith, to this Board by telephone and by letter during the morning of said May 9th, 1914, asking said Board to order and direct that an autopsy be held for the purpose of determining the cause of death of said deceased, and that this Board advised the said defendant that it had no authority to order an autopsy.

"17. That the body of said deceased between the hours of six o'clock in the morning and noon of the said 9th day of May, was examined by three physicians and that it was the opinion of the medical witnesses that said deceased died from one of the forms of heart disease and not from strangulation, suffocation, or asphyxiation.

"18. That the deceased had never complained to the claimant or their family of having any trouble with his heart, and had never been treated therefor as far as his family know.

"19. That the average daily wage of said deceased during the 42¾ days he was employed by said defendant in said fuel house was $1.90; that previous to the time deceased was employed in the fuel house he was employed at various work about the mill and plant of defendant company and from May 10th, 1913, to May 10th, 1914, deceased had received a total of $540.49, or an average weekly wage of $10.39, during the year prior and immediately preceding his injury.

"20. That it was agreed by counsel that one cubic yard of the refuse in said fuel house would weigh 600 pounds.

FINDINGS OF LAW.

"From the foregoing we find that the injury or death of deceased arose out of and in the course of his employment in accordance with Part 2 of Sec. 1, Act 10, Public Acts of 1912, and that compensation shall be awarded accordingly; that his average daily wage during the 42¾ days deceased was employed in said fuel house was $1.90, and the award of the Committee of Arbitration is accordingly affirmed."

The evidence taken before the arbitrators is made a part of their return by the Industrial Accident Board. The following additional facts may be gathered from a perusal of the evidence.

The coroner who conducted the inquest testified:

"The face of Mr. Linsteadt was discolored, pretty much black."

The undertaker who prepared the body for burial, gave the following testimony:

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"I found the mouth packed with sawdust, not exactly tight, but as much as could be gotten into it. There was some in his throat, eyes and nostrils. The sawdust in his eyes was between the lid and the eye ball. I did not notice much out of the ordinary as far as any discoloration of the man's face. * * * The effect of embalming fluid when injected in the human body has a tendency to bring it back to a natural color. * * * I could not state what he died from. My idea is that suffocation is what I understood. My common sense would tell me that. * * * I have never studied medicine and wouldn't be able to state what he died from."

Dr. King, sworn on behalf of the defendant, testified:

"I would say that it would be very strong evidence that he did not die of strangulation or asphyxiation. * * * There would be discoloration of the features. * * * There would be no way of finding out whether he died of heart disease without an autopsy. There may be or may not be a struggle from death of heart disease."

Dr. Ramsdell, a witness for the defendant, testified:

"Without an autopsy it would be impossible to determine whether he died from heart disease or other cause. * * * I have attended persons dying of heart failure at their bed side and the cessation of breathing usually starts immediately. A very slow intake of air, you can hardly recognize it. They will breathe very slow and then (illustrating) out, with just a natural exhaustion. The lungs will suck in a little air, but there will be no decided breathing.

"Q. Mouth usually open or closed?

"A. It relaxes.

"When I saw the deceased he had no sawdust in his mouth. A man dying of heart trouble, I doubt whether his breathing would be of sufficient force to draw sawdust into his mouth and thoroughly clog it."

The claimant's daughter testified:

"I examined father's face and body after the body was returned to the house. I looked at him the next morning and his face looked very nice. It was white but under his arms, he was in the casket, and I pushed back his coat sleeve, and the skin was dark looking and back of his ears had a purple look."

It is the claim of the appellant that the record contains absolutely no evidence from which the Industrial Accident Board

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could lawfully draw the inference that the deceased met his death as the result of an injury arising out of and in the course of his employment. Reference is made to the case of McCoy v. Michigan Sugar Co., 180 Mich. 454, where we said:

"The burden of furnishing evidence from which the inference can be legitimately drawn that the injury arose 'out of and in the course of his employment' rests upon the claimant. * * * If an inference favorable to the applicant can only be arrived at by a guess the applicant fails. The same thing happens where two or more inferences equally consistent with the facts arise from them."

See also Hills v. Blair, 182 Mich. 20.

Appellant's contention is stated in the following language:

"In applying the foregoing principles to the facts in the case at bar, the inquiry arises, do the facts as contained in the Board's findings of facts establish by the burden of proof the right of applicant to compensation for the death of deceased? The right of the parties to this appeal is determined by this finding of facts by the Industrial Board. They are binding and conclusive upon the parties in this proceeding for review, unless there is no evidence at all upon which to base them. It is not claimed by the appellant, however, that these findings of fact are not warranted by the evidence. On the contrary, no other findings were possible. It is the contention of the appellant, however, that the Board erred in finding these facts sufficient to award compensation to applicant under the Act in question, for the reason that they fail to establish by any preponderance of the proof that the death of the deceased arose out of his employment. The Board arrived at an erroneous conclusion of law from the facts as found by them."

It seems to be the contention of the appellant that the claimant must establish the fact that the injury giving rise to the demand, arose out of and in the course of his employment, by a preponderance of the evidence, as in a case at law. Judged by this standard it may perhaps be said that claimant failed to sustain the burden. The Act, however, does not cast this burden upon the claimant. It provides, Sec. 12, Part 3:

"The findings of fact made by said industrial accident board acting within its powers, shall, in the absence of fraud, be conclusive, but the supreme court shall have power to review questions of law in-

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volved in any final decision or determination of said industrial accident board."

In two recent cases we have determined that where there is any competent evidence to support the finding of the Board, this court will not undertake to weigh the evidence or disturb that finding. Rayner v. Sligh Furniture Co., 180 Mich. 168; Bayne v. Riverside Storage & Cartage Co., 181 Mich. 378.

While this court might reach a different conclusion as to the cause of the death of the claimant's decedent than that reached by the board, we do not think it can be said that there is no evidence in the record justifying that conclusion.

It will be noted that the award provides for the payment of $6.17 per week for a period of 300 weeks. This sum is based upon the earnings of the deceased for the 42¾ days preceding his injury. The record discloses, however, that his average weekly earnings covering the year prior to his death amounted to but $10.39. Under Section 11, Part 2, this sum should have been made the basis of the award. The finding of the Industrial Accident Board on the question of liability is affirmed, and the case is remanded to that Board for the entry of an order in the proper amount, which would be one-half of $10.39 per week for 300 weeks.

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SUPREME COURT.

ROY CARPENTER,
Applicant and Appellee,
vs.
DETROIT FORGING COMPANY,
Defendant and Appellant.

PARTIAL LOSS OF HAND—BASIS OF COMPENSATION PARTIAL DISABILITY RESULTING—NOT PERCENTAGE.

Applicant while employed in the shop of respondent was injured by a steel sliver entering the third finger of the right hand near the second joint. Blood-poisoning and inflammation followed, leaving the hand in a partially disabled condition, so that the fingers can only be partially closed. A settlement agreement was made and approved by the Board and full payment made under the same, but it was shown that such agreement was made before the extent of the injury was fully known. Later, applicant filed a petition praying for reopening of the case and an award of further compensation, and on the hearing of such petition, 60 weeks' additional compensation was granted. Respondent contends that the reopening of the case and an award for the partial loss of a hand were not authorized by law.

HELD: 1. That under the facts, the Board acted within its authority in reopening the case and awarding further compensation.

2. That the law does not authorize an award on the basis of a percentage of the specific indemnity for the loss of a hand, and that the additional compensation awarded should be on the basis of partial disability and resulting loss in earnings.

This case is here on certiorari to review the action of the Industrial Accident Board in setting aside a compensation agreement and awarding additional compensation to the employe. Modified.

Benjamin & Betzoldt, of Detroit, Attorneys for the Applicant.

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Douglas, Eaman & Barbour, of Detroit, Attorneys for the Defendant.

This case is here on certiorari to review the action of the Industrial Accident Board in setting aside a compensation agreement and awarding additional compensation to the employee.

On September 26, 1913, the claimant was working in the shop of the Detroit Forging Company. While taking steel sockets out of a box or tray, a steel sliver entered the third finger of the right hand near the second joint. It is admitted that this was an accident arising out of, and in the course of his employment. The wound became infected and claimant was totally disabled for about ten weeks. The fingers, hand and entire arm were swollen, and as the swelling and infection subsided they caused adhesion of muscles and tendons of the right hand which prevented the entire closing or bending of the fingers. We shall refer later to the testimony relating to the labor performed by claimant after the accident.

On the 26th of December, 1913, an agreement calling for compensation upon the basis of one-fifth of the loss of the four fingers of the right hand, that is, calling for twenty weeks' compensation, was signed by the claimant and the Globe Indemnity Company and forwarded to the Industrial Accident Board, which refused to approve the same unless ten weeks more were added to compensate claimant for the time he was disabled from performing any work, on account of said injury. On January 26, 1914, another agreement was signed by said claimant and said indemnity company, by which said claimant was to receive, as full compensation, $9.00 per week for twenty weeks, on the basis of one-fifth of the loss of four fingers of the right hand, and in addition ten more weeks at $9.00 per week for the time the claimant was unable to do any work on account of said injury.

The last-named agreement was duly approved by the Industrial Accident Board on January 29, 1914, and the whole of

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said thirty weeks of compensation was promptly paid to claimant. At the time claimant was injured his average weekly earnings were $18.00.

After the payment of the 30 weeks' compensation, claimant made demand upon respondent for payment to him of additional compensation for said injury, and respondent disclaimed liability for further or additional compensation. On June 24, 1914, claimant filed a sworn petition with the Industrial Accident Board, praying that his agreement aforesaid of January 26, 1914, be set aside, and that further compensation for the above injury be awarded him.

In said petition, said claimant, among other things, stated:

"3rd. That by reason of the injuries to his right hand and right arm, your petitioner is unable to follow his occupation of that of polisher and is unable to earn said wages of $18.00 per week, but, on the contrary, at the present time and for some time past, has been unable to earn any wages whatsoever. That your petitioner is unable to make use of said right hand and arm, and he avers that the injuries to said right hand and right arm will be permanent, and that he will be deprived of the use of said right hand and arm, for and during the remainder of his natural life.

"4th. Your petitioner further avers that on or about the 26th day of January, 1914, at the request and relying upon the representations of the Globe Indemnity Company, he then and there signed a certain alleged agreement in regard to compensation, reference to which agreement is hereby had, and which said agreement is now on file in this cause.

"5th. Your petitioner further avers that before signing said agreement, he then and there asked the representative of said Globe Insurance Company that if his said injuries as aforesaid continued for a longer period than anticipated, or became permanent, if petitioner would be entitled to additional compensation; that said Globe Indemnity Company, through its said representative, then and there informed your petitioner that if his injuries were more serious than at first anticipated, your petitioner would receive compensation until he would have the use of said right hand and arm, as provided for under the so-called compensation law; that said representative further stated that said agreement so to be executed was merely preliminary and not binding upon your petitioner if said injuries continued for a longer time than contemplated by the agreement and became permanent; that said representative further stated that in such event, the Industrial Accident Board would re-open and set aside said agree-

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ment and give your petitioner such additional compensation as would properly compensate your petitioner for his injuries so sustained; that your petitioner, relying upon such various representations and believing them to be true, then and there signed said alleged agreement in regard to compensation."

On September 15, 1914, testimony was taken by deposition in support of, and in opposition to said petition. Said claimant and his wife (the latter testifying that she was present when said agreement was made) gave testimony tending to support the claim set forth in the petition relating to the statements made by the representative of said indemnity company at the time said agreement was signed.

E. T. Pocklington, the adjuster who made the alleged settlement with claimant, testified in part as follows:

Q. "State whether or not you said anything to him about his hand. I think he has admitted that you did—being permanently injured at that time?

A. "Yes, that was the basis upon which we made the settlement. First, I started him out on the loss of time basis, paying him $9.00 a week, just simply because of the fact that he was disabled, and not acknowledging any permanent disability. The reason I did that was because at first Dr. Blain told me he thought there might not be any permanent disability, and that is customary anyway with all where we make payments under the compensation law, and I paid him along for probably eight weeks, when the doctor told me that there was a permanent injury, there would be a permanent stiffening.

Q. "Of what, the fingers?

A. "Of the fingers, partial stiffening, and this reply of the doctor was made to my inquiry because I had decided myself, seeing the hand week after week, it was permanent, so I took it up with the doctor and he said it would be permanent, and over the telephone he told me a fifth would be a fair percentage upon which to base the loss of function; and the next time Mr. Carpenter came in I told him that there wasn't any question at all but what his injury was permanent. I said, it may get a little better; there may be some improvement, but nevertheless it will never be like it was before and the only thing we can do is to adjust the loss *on the basis of the present condition.* 'Now,' I says to Mr. Carpenter, 'if you had lost all of those fingers you would be entitled to compensation for one hundred weeks,' and I explained that as he has already attempted to explain it, giving him the number of weeks for each finger, 'but now,' I said, 'you haven't lost all, there is considerable amount of use left,'

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I says. 'Is it half as bad as though you had lost all?' and he admitted that it wasn't; was quite vehement in his denial; and I said, 'is it a quarter as bad?' No, it wasn't a quarter as bad. 'Well,' I said, 'Isn't it about, or wouldn't it be about one-tenth part as bad?' And Mr. Carpenter allowed that it would be about a tenth, and then I said: 'If I allow you twice as much, or a fifth, you will be satisfied,' and he was perfectly satisfied; that is the way that Mr. Carpenter and I talked the matter over. It was strictly on the basis of a permanent disability, and *based on the present condition of the hand*, and then at that time, *the condition at that time*, and so far as his future trouble is concerned, I told him. He asked me: 'If the hand gets stiff so I cannot do anything with it, what can I do then?' And I said: 'If you should lose the hand, the entire usefulness of the hand, you will get paid for the hand. The Board will see that you get paid.' I was very particular to impress upon his mind at the time of signing the agreement, that was an agreement between us. I am very particular to see that everyone who signs an agreement or settlement understand what they are signing."

From the evidence produced before the Board, it found the facts to be in substance as follows:

(a) That on December 26, 1913, when the claimant and Mr. Pocklington came to an understanding or agreement, that the amount of said claimant's injuries would be one-fifth of the loss of the four fingers of said right hand, that said right hand was then in a splint and that it was impossible for either party, at that time, to fully know whether there would be any permanent stiffness of the fingers or hand, or the extent of claimant's injuries, but both parties expected said injuries would be permanent to some extent, but to what extent was not then known.

(b) That on January 26, 1914, when the last agreement between the parties was signed, it was then expected by Mr. Pocklington, adjuster, that the injuries sustained by claimant, were permanent, and he so informed the said claimant, and that said settlement agreement was signed by claimant upon the understanding and basis that the injuries he had received did not, and would not amount to more than one-fifth the loss of the four fingers of the right hand, and if it afterwards developed that the injuries were more serious, the claimant

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would have the right to petition the Board for further compensation.

(c) The Board found, as a matter of fact, that the injury sustained by claimant was permanent, and affected the use of the entire hand; that the condition of claimant's hand had improved since January 26, 1914; that, however, claimant had lost 60% of the normal use of said right hand.

(d) That the evidence disclosed that on account of this injury the average weekly earnings of the claimant, from the time he was able to return to work, had been greatly decreased, and that he was, and would be, unable in the future to do metal grinding and polishing, (the work which he was engaged in when injured,) or other skilled work requiring the full use of both hands, and that as to common labor, he would be partially incapacitated, all on account of his injuries, and the permanent nature thereof.

(e) That the then condition of claimant's hand and arm, and his resulting disability, were due to the injury received by him September 26, 1913.

Thereafter the said Board entered an order, in writing, granting the prayer of claimant, and adjudging that he was entitled to receive and recover from the said respondent, in addition to all sums theretofore received by him, compensation for sixty weeks at the rate of $9.00 per week; that the portion of such compensation as that had accrued from the time of the stopping of payments to said claimant, should be due and payable on the date of said order, the remainder thereof to be paid weekly in weekly payments, in accordance with the provisions of the Workmen's Compensation Law,—the amount thus awarded to be in full of all claims of said applicant against said respondents.

Thereafter the appellant filed a motion for a rehearing, contending that the award and order of the Board granted compensation on the basis of a certain percentage of the loss of the hand or arm, which loss of use was less than total loss of use of same, and that this basis was erroneous, which motion was denied.

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The said Board further stated in its return to the writ, that there was no claim made upon the hearing of the matter that Mr. Pocklington, adjuster for the Globe Indemnity Company, intended to act fraudulently.

As a finding of law, said Board found that under the facts in the case the applicant was, as matter of law, entitled to sixty weeks' additional compensation.

The assignments of error are as follows:

(1) In holding that the agreement with regard to compensation was not final and binding upon claimant.

(2) In basing the award on a partial loss of four fingers of the right hand, and not on one-half the difference between claimant's average weekly wages before the injury, and the average weekly wages which he was, and is able to earn after the injury.

(3) In basing the award on a partial or percentage loss of a hand instead of on the extent of disability, viz.: one-half the difference between claimant's average weekly wages before the injury, and the average weekly wages which he was, and is able to earn after the injury.

(4) In basing the award on a partial or percentage loss of the right arm, and not on one-half the difference between claimant's average weekly wages before the injury, and the average weekly wages which he was, and is able to earn after the injury.

(5) In determining and ordering respondent to pay to claimant the sum of $540, in addition to the amount already paid as further compensation for the accident and injury to claimant.

The followng request was made by counsel for respondent and appellant at the hearing to settle the return to the writ herein:

1. That the return state, and show upon what clause and provision of Act No. 10 Public Acts of 1912 the award arrived at by the Board, in this case was determined and based.

2. That the basis of the award be shown in the return to the writ.

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Which request the Board refused, for the reason that the finding of law made by it, and set forth in the return, is sufficiently definite.

Counsel for appellant state that there are but two general questions presented in the case:

1. Did the Board err in setting aside the settlement agreement of January 26, 1914?

2. Was the award based on a percentage loss of the right hand?

(1) Upon the first point counsel rely principally upon section 5 of Part 2 of the Act. They concede that such an agreement as the statute contemplates, may be set aside for fraud, mistake or undue influence. In our opinion the statute contemplates an agreement and settlement made without contingency or condition; and not one based upon a possible or probable event that may render it inoperative. An agreement and settlement based on the strength of such a condition or contingency is not such as the statute contemplates. Here, according to the testimony of the adjuster Pocklington, the settlement was based upon the understanding that if claimant's hand got worse so that he should lose the usefulness of the hand, the Board would see that he got paid for it.

The testimony of the claimant and his wife went much further, and was to the effect that if the hand and fingers did not get better, he could put the matter before the Board, and that the agreement would not be binding, or final.

It does not meet the question to say that Mr. Pocklington did not intend to act fraudulently. The material question is, what was the effect of what he said?

Ordinarily one cannot successfully ask for affirmative relief on the bare ground that he was either ignorant of the law, or mistaken as to what it prescribed. But it is now well settled that this rule is not invariably to be applied. In many cases where injustice would be done by its enforcement, this has been avoided by declaring that a mistake as to the existence of certain particular rights, though caused by an erroneous

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idea as to the legal effect of an instrument, or as to the duties or obligations created by an agreement, was really a mistake of fact, and not strictly one of law, and so did not constitute an insuperable bar to relief.

> Reggio v. Warren, 207 Mass., 525, as reported in Vol. 20 A. & E. Ann. Cases, 1244, and cases cited in note.

The rule is that a release may be rescinded for a mutual mistake of law. Kirchner v. New Home Sewing Mach. Co., 135 N. Y., 189.

Whether placed upon the ground of constructive fraud, or mistake of fact as well as of law, the law forbids that a party, who, with full knowledge of the ignorance of the other contracting party, has not only encouraged that ignorance, but has knowingly deceived and led that other into a mistaken conception of his legal rights, should shield himself behind the doctrine that a mere mistake of law affords no ground for relief.

We think that placing its action upon either ground, the Board did not err in acting, notwithstanding the so-called settlement agreement.

(2) The remaining assignments of error may be considered together.

It should be stated that the order of the Board was made before the opinion of this court in Hirschkorn v. Fiege Desk Co., 150 N. W., 851, was rendered. That case has been followed by Cline v. Studebaker Corporation, 135 N. W., 519.

Those cases hold that as the Act (Section 10 Part 2) under the schedule of specific indemnity provides compensation only for the loss of an eye, an award cannot be arrived at upon a basis of a partial loss of the same.

We think that this principle, and the reasoning of the cases apply as well in the case of an injury to a hand as to an eye. Although there is no special finding upon the point, it is evident from the language used by the Board that it made its

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allowance under the schedule of fixed liabilities contained in the above cited section, instead of under the first clause of that section, which is as follows:

"While the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employe a weekly compensation equal to one-half the difference between his average weekly wages before the injury, and the average weekly wages which he is able to earn thereafter, but not more than ten dollars a week; and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of injury."

It was our first impression that the amount awarded was no greater than could have been given, by the evidence, under the clause above quoted, and that appellant had not been injured in the amount of the award. A more careful examination of the evidence leads us to doubt the correctness of that impression.

Under the practice as stated in Andrejwski v. Wolverine Coal Co., 182 Mich. 298, and Finn v. Detroit, Mt. C. & M. City Ry., 155 N. W., 721; 22 Det. L. N., 1204, the order of the said Industrial Accident Board is therefore reversed, and the case hereby remanded for such further hearing therein before said Board, as the parties may desire.

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ARTHUR L. BEVANS,
Applicant,
vs.
STEWART LAUNDRY COMPANY,
Respondent.

BARNYARD INFECTION—EVIDENCE—SUFFICIENCY OF.

Applicant claimed that the disease from which he suffered was contracted by infection caused by contact with and caring for sick horses of his employer and that it was an injury by accident within the meaning of the law.

HELD: Evidence insufficient to establish the claim.

Opinion by the Board:

Applicant claims compensation for disability resulting from what is termed barnyard infection which he claims was caused by contact with and caring for sick horses of his employer, the respondent in this case. It is claimed that the infection is a germ disease and that its communication to applicant from the horse constituted a personal injury by accident within the meaning of the Law. We have given very careful consideration to the case, and while convinced that a disease contracted by infection from the lodgment of germs or bacilli in the system constitutes an industrial accident, we are not convinced that the proofs will sustain the claim here made. The evidence shows that the first horse was taken sick on April 7th and two other horses became sick within the next 30 days. Bevans took care of the horses, administered medicine with a syringe and later, in the month of June, experienced a swelling in the throat. On August 3rd he consulted Dr. Colver who treated him, operated on the throat and later, December 3rd, took him to Ann Arbor for examination by Dr. Canfield. He was operated on by Dr. Canfield at Ann Arbor on December 9th, and returned home January 9th. Bevans says in his tes-

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timony that his disease was just the same as the horses had, so far as he could observe. The medical testimony is given by Dr. Mix, the veterinary who treated the horses, and Dr. Colver. Dr. Mix had no knowledge of the disease Bevans suffered from or of its nature. Dr. Canfield was not called as a witness. Dr. Colver testified that he did not know what Mr. Bevans' disease was or from what germ he was suffering. His testimony when fully examined does not make a reasonable showing in support of the claim that Bevans contracted the disease from the horse by accidental communication of the germ while caring for the horse or administering medicine. In the absence of evidence tending to prove that Bevans contracted this disease from the horse by showing the substantial identity of the germ and disease, there is no substantial basis for awarding compensation. Dr. Colver was not present at the operation performed by Dr. Canfield. The only evidence as to what Dr. Canfield found is the hearsay evidence of Dr. Colver as to what was said by Dr. Canfield.

We are convinced that the proofs do not fairly establish the claim and that no compensation can be awarded.

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JOSEPH KALUCKI,
Applicant,
vs.
AMERICAN CAR & FOUNDRY COMPANY,
Respondent.

LOSS OF EYE RESULTING SEVERAL MONTHS AFTER ACCIDENT—LIMITATIONS.

Applicant received an injury to his left eye which was not considered serious and did not prevent him from doing his work and earning the same wage for several months following the accident. About 8 months from the date of the accident the eye was examined by an expert and the sight was found to be entirely gone. Respondent claims that compensation is barred by the failure to make claim within 6 months after the happening of the accident.

HELD: 1. That while the accident set in motion agencies which ultimately destroyed the sight of the eye, no right to compensation accrued and no compensable injury existed until the point of time was reached where the eye was a total loss.

2. That the injury complained of is the loss of the eye which did not result until several months after the accident, and that the right to compensation is not barred by failure to make claim.

Opinion by the Board:

Applicant's left eye was injured on July 29, 1914, while he was in the employ of respondent and engaged in his usual work, the injury being caused by bits of steel entering his eye. The accident was reported to the company's doctor, and applicant was furnished medical service for a few days, after which he returned to work, it being thought that the eye was not seriously injured. He was able to do his usual work and receive the same wages, although the eye caused him some trouble and inconvenience. He continued in the employ of the company until the work on which he was employed was finished. The eye continued to cause him more or less trouble, and being treated and cared for with the expectation that the

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trouble would be overcome. On April 7, 1915, applicant had the eye examined by Dr. Don M. Campbell, and it was then found that the vision of the eye was gone and the eye useless. Claim was made for compensation for the loss of an eye and the case proceeded to arbitration. The principal contention of respondent is the want of notice of injury and that no claim for compensation was made within six months after the accident. The formal claim for compensation was filed and served on the employer on June 10, 1915.

It appears that the employer had knowledge of the accident and caused the injury to the eye to be treated and cared for by its physicians. The serious question in the case arises with reference to the claim for compensation. The furnishing of medical service and treatment by the employer would seem to constitute a waiver of its defense based on failure to make such claim. The defense is a tehcnical one and is interposed in this case to defeat applicant's claim for a very serious injury which is otherwise concededly meritorious.

The claim put forward in this case, that applicant should have made formal claim for compensation for the injury to the eye within six months from the date of the accident, raises some important considerations. It has been held by the Supreme Court that no compensation is recoverable for injury to an eye where the sight is not wholly lost, and where the injured man is able to perform his work and earn the same wages. Under these rulings, the applicant had no claim that could be asserted under the Compensation Law during the first six months following the accident. It seems that it could not reasonably be held that his failure to go through the formality of making a claim during this period, forever bars his right to recovery for the injury. Under the rulings above referred to, the applicant had no enforcible claim under the Compensation Law until the sight of the eye was gone. Hirschkorn vs. Feige Desk Company, 184 Mich. 239. Not until the examination made by Dr. Campbell on April 7, 1915, was he aware that the eye was lost. Up to that time he could not have known that he had a claim for compensation under the

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Law. It is true that he knew a portion of the sight had been lost, but this did not entitle him to compensation, as our Law does not permit recovery for the loss of a percentage of the eye which is less than total. It seems therefore that a distinction must be made in cases of this kind between the accident and the resulting injury. It is apparent that the accident set in motion agencies which ultimately destroyed the sight of the eye, but the loss of the eye which would be the only compensable injury in the case did not occur until several months after the accident. A similar question has been recently passed upon by the Supreme Court of Nebraska in the case of *Johanson* v. *Union Stockyards Co.*, 156 N. W. Rep. 511. The injury was the loss of an eye which occurred several months after the accident, the principal defense being the failure to file claim for injury within the six months period. The Court say:

"It is conceded that the accident happened more than six months before this claim was made (the date of the accident being December 18, 1914). The trial court found 'that said accident resulted in a total disability to plaintiff on December 25, 1915.' * * The plaintiff went to his home the night after the accident, and he testified that, with the help of his niece, he washed his eye with warm water, and they appear to have so continued treating it, without realizing what might result from the accident, for several days, until the 25th day of December, when he was induced to consult a physician, who advised him to go to a hospital and consult an expert. This he accordingly did, and was informed that his eye was in a serious condition and might result very unfavorably. During this time, apparently, the injury resulting from the accident gradually became developed, and it cannot be said that the injury resulted from the accident, within the meaning of the statute, before the time it was discovered that it might become permanent, which was some time after the 25th of December. This evidence clearly justifies the finding of the trial court under this statute, that the accident resulted in a total disability to plaintiff on December 25, 1915. It also appears from the evidence that the plaintiff's foreman knew of the accident at the time, or very soon after it occurred. He so testifies himself. He could not, of course, then have known of the injury as it finally developed."

While the distinction between "accident" and "injury" in the case cited is based to some extent upon the definition of

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these terms given in the Nebraska Act, substantially the same distinction exists independent of statute, as pointed out by us in the opinion filed in the Harry Hart case. It seems that this is the only reasonable interpretation of the law in case of injury to an eye which does not disable the workman from continuing his employment and earning his former wages, but which ultimately results in the loss of the eye. No valid right to compensation exists for which claim could be made until the point of time is reached where the eye is a total loss. It would be most unreasonable to require that the injured workman file claim for compensation before a legal right to such compensation accrued to him. On the other hand, it would be a harsh rule of interpretation to cause the forfeiture of a meritorious claim for such a serious injury, on the ground that the injured man did not claim compensation for the loss of an eye before he was aware that it was lost.

INTER-INSURANCE EXCHANGES.

The Inter-Insurance Exchanges licensed to do business in Michigan under Act 278, Public Acts of 1913, are so organized that the power to assess their membership is limited and the liability of the members several. It is a fundamental requirement of workmen's compensation insurance that the liability of the insurer be limited only by the amount necessary to pay all lawful claims of the workmen covered, and their dependents. Therefore, such Exchanges must provide for emergency losses and any deficiencies by re-insurance in a company or companies of such responsibility as shall meet the approval of the Industrial Accident Board.

Under the provisions of Act No. 278 of Public Acts of 1913, a number of Inter-Insurance Exchanges have been licensed to do business in Michigan. These Exchanges all operate on sub-

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stantially the same system, viz., through an attorney in fact to whom each member of the Exchange gives a power of attorney. This power of attorney authorizes the person or corporation to exchange contracts of indemnity with and for the benefit of other members of the Exchange. The attorney in fact controls the operation of the Exchange, carries on the business, adjusts the losses and collects the funds from the members for such losses and the expenses of the operation.

The Exchanges admitted by the insurance department of the state to do business in Michigan, have, through their respective attorneys in fact, adopted and attached to their policies or certificates the Rider prescribed by the Industrial Accident Board, and used by all of the liability companies in Michigan which are carrying compensation insurance. If the action of such attorneys in fact in so adopting the Rider prescribed by the Board is within their powers and their subscribers are thereby made liable for all losses according with the provisions of such Rider, then they would be entitled to the approval of the Board in carrying the risk of employers of labor in this state. But an examination of the powers of attorney of the different Exchanges raises a very serious question as to the authority of the several attorneys in fact to so bind their subscribers.

Immediately after the compensation law went into effect in 1912, the Board required all liability companies and mutual companies carrying compensation insurance to remove from their policies the clause placing a limitation upon the amount of the company's liability resulting from any one accident. This ruling at first met with serious objection from the insurers, but all have complied with it; and it is now established as a part of the system in Michigan that the liability of the insurer growing out of any one accident is limited only by the amount necessary to pay compensation to all workmen injured and the dependents of all who are killed thereby. Having held from the beginning that any company assuming to carry the risk for an employer of labor must assume and carry all risk, the Board could not now properly approve contracts

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of Indemnity Exchanges unless they fully meet the requirements that other companies and organizations have been required to meet. The fundamental purposes of the law in providing for insurance is to make certain the payment to each injured workman of all of the compensation which he is entitled to receive under the law. The necessity for the action taken by the Board in requiring that the obligations of the insurer be unlimited is demonstrated by the explosion in the plant of the Mexican Crude Rubber Company of Detroit, where nearly a dozen workmen were killed and a number injured.

While the powers of attorney of the Exchanges referred to differ in some respects, they are alike in their essential features. They provide that the attorney shall have no power to bind the subscribers jointly, and that he can only bind such subscribers severally, and that no subscriber shall be liable to pay during any one year more than double the (advance) premium for that year. That the power of the attorney in fact is entirely limited, and further that the power of attorney may be terminated by the subscribers at will. Sections 5 of Act No. 278 of Public Acts of 1913, provides for the filing of a statement under oath in the insurance department of the state by the attorney in fact of each Exchange admitted to do business in the state, setting forth among other things the maximum liability for any one accident occurring in the business of any of its subscribers. Such statements have been filed with the insurance commissioner, some of them limiting the liability to $10,000 and some to $20,000, which latter sum is the highest amount specified in any of the certificates. In view of the provisions of the several powers of attorney and such certificates, the action of the attorneys in fact, in assuming to adopt the Rider prescribed by the Board, is clearly beyond and in conflict with the powers of such attorneys. Their authority is derived entirely from the powers of attorney, which constitute the sole grant of power from their subscribers. We are therefore of the opinion that the action of the attorneys in fact of such Exchanges in attaching to their policies the Rider required by the Industrial Accident Board is in each

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case ultra vires and does not bind the subscribers beyond what is covered in the express grant of power. The provisions of the powers of attorney that none of the subscribers shall incur a joint liability, but shall only incur a limited several liability, clearly makes impossible the assumption of the unlimited risk required. For the above reasons we deem it necessary to withhold approval of all applications where the risk is to be carried by indemnity Exchanges under the limitations above mentioned.

The entire structure being built upon the powers of attorney, the structure itself cannot be broader than its foundation. It seems therefore that the remedy must come from a change in system, particularly in the powers of attorney, which should be so changed as to provide that the liability of the Exchange to injured workmen and their dependents is limited only by the amount that is necessary to satisfy their claims under the compensation law. They should also provide that emergency losses should be covered by re-insurance, and that such re-insurance should be carried in a company or companies of such responsibility as to meet the approval of the Industrial Accident Board. Another reason why re-insurance in the line above suggested is necessary is the fact that the liability of members of the Exchange is limited and is merely a several liability, not a joint liability such as is the case in mutual insurance companies. Under this limitation of the liability of the members of the Exchange, there would be no means of compelling the payment by such members of the money necessary to meet the emergency losses, and therefore such emergency losses would have to be provided for by re-insurance. In the arguments presented to the Board by the representatives of the Inter-Insurance Exchanges, it was claimed that these emergencies would in actual practice be rare, which is probably true. But this fact would be no reason why the emergencies should not be provided for so as to make certain that the employe injured would receive his compensation. If the emergencies are rare as claimed, this ought to result in a very low rate for re-insurance for emergency losses, and the re-

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quirements of such re-insurance would not be a considerable burden. The requirements of Act No. 278 of Public Acts of 1913 could be met by having the verified statement filed with the insurance department by the attorney in fact of each Exchange, set forth that the maximum liability for any one accident is the amount necessary to pay all lawful claims of the workmen or their dependents who are injured by such accident.

It is the opinion of the Board that if the conditions here enumerated can be met by the Inter-Insurance Exchanges, that the question of their carrying compensation insurance in Michigan can be worked out.

CONVICT, INJURED WHILE AT WORK DURING PRISON TERM, NOT ENTITLED TO COMPENSATION.

Opinion by the Attorney General:

It is my opinion that a prisoner working on state account is not to be considered as an employe within the meaning of the act. It can scarcely be said that there is any contractual relation between the State and such prisoner, in view of the fact that the latter is restrained of his liberty as a punishment for crime, neither could such prisoner be considered as being in the employ of any contractor with the State for his services, for between such contractor and such prisoner there is no

*A number of the Inter-Insurance Exchanges have complied with the above and are doing compensation business in the State.

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privity whatever, consequently, it follows that a prisoner of the State who is injured while working on state account or while working on contract would have no redress under the liability Act.

Respectfully yours,
GRANT FELLOWS,
Attorney General.

VOLUNTEER FIREMEN ARE EMPLOYES WITHIN THE MEANING OF THE COMPENSATION LAW.

Opinion by the Attorney General:

Cities and Villages are authorized by the laws relating thereto to employ men to protect property located within their confines from fire.

Section 3277 Etseq, Compiled Laws; and
Section 2878 Etseq, Compiled Laws.

This can be accomplished either by a permanent fire department or by paying for the help as needed, namely,—by the so-called volunteer system. In very many cities and villages the work of controlling and extinguishing fires is done by volunteer firemen who are paid at a given rate for each fire as it occurs.

The provisions of the Workingmen's Compensation Law which seem to be applicable are as follows:

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Part 1, Section 5 "The following shall constitute employers subject to the provisions of this Act: 1, The State and each County, City, township, incorporated Village and school district therein." * * * * *

Part 1, Section 7 "The term 'employe' as used in this Act shall be construed to mean: 1, Every person in the service of the State, or of any County, City, township, incorporated village or school district therein under any appointment, or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, township, incorporated village or school district therein: Provided, that one employed by a contractor who has contracted with the County, City, township, incorporated village, school district or the state, through its representatives, shall not be considered an employe of the State, County, city, township, incorporated village or school district which made the contract."

There can be no doubt that as the regularly employed firemen in cities and villages, where a fire department with a paid force is maintained would come within the provisions of the law, the same as other employes of the cities or villages; this because cities and villages are expressly declared to be employers within the meaning of the act, and employes of cities and villages are declared to be employes within the meaning of the act. As a general proposition, an employe is one who works for another.

The definition of employer and employe as given in the Act does not seem to carry with it any particular requirement as to the period of employment, nor does it import continuous employment.

I am of the opinion that any appreciable period of time in which one person is in the employ of another would be sufficient to constitute the relation of employer and employe between them. Neither does the act, except in Section 2 of Part II, place any restrictions on the kind of work that constitutes employment within the meaning of the law. The principal desideratum is that the relationship exists and that injury is received in the course of the employment. These facts being established and the employer or employe not being within the excepted classes, the right to the benefits conferred by the Act follow the injury.

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Although the matter is not free from doubt, I am inclined to the opinion that your inquiry should be answered in the affirmative. The exact or approximate compensation to which an injured volunteer fireman would be entitled to, would in my opinion be rather difficult of computation under the provisions of section 2 of part II, but as that only affects the amount recoverable and not the right to recover I shall not further enlarge upon it in this opinion.

Respectfully yours,
GRANT FELLOWS,
Attorney General.

STATE MILITIA, MEMBER OF, NOT AN EMPLOYE WITHIN THE MEANING OF THE COMPENSATION LAW.

Opinion by the Attorney General:

Section 47 of Act 84 of the Public Acts of 1909 was undoubtedly intended to cover cases of this kind and to invest the Board of State Auditors with discretion in connection with the granting of relief to the families of officers or enlisted men suffering permanent injury or death while engaged in actual service within the State. The section referred to reads as follows:

"In case any officer or enlisted man shall be wounded or disabled while in service in case of riot, tumult, breach of the peace, resistance of process, or whenever called in aid of the civil authorities, he shall be taken care of and provided for during such disability at the expense of the county where such service shall have been rendered; and in case of death or permanent disability in consequence of such ser-

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vice, he or his widow and children or next of kin shall receive such relief as the Board of State Auditors shall determine to be just and reasonable, payable out of the moneys in the general fund of the State not otherwise appropriated."

If the section above quoted is still in full force and effect relief may be afforded in accordance with its provisions. Not having been expressly repealed by any subsequent enactment it must be deemed to be operative now and applicable to this and similar cases unless repealed by implication by Act No. 10 of the Public Acts of 1912, First Extra Session, commonly referred to as the Employers' Liability Act. I am impressed however, from an examination of the latter statute that it was not intended to cover and does not in fact apply to members of the National Guard when engaged in service in accordance with the provisions of Act No. 84 of the Public Acts of 1909. The term "employe," as used in the Employers' Liability Act, is expressed to mean "every person in the service of the state * * * * * under any appointment, or contract of hire, express or implied, oral or written * * * *." It is thus clearly indicated that the relation of employer and employed under this Act must be based upon a contract within the usual meaning of that term. It is extremely doubtful in my opinion if the relation existing between the state and a member of the National Guards may properly be so considered so far as the case before us is concerned. It is a general proposition that the meaning of terms used in any particular legislative enactment should be determined in accordance with the spirit and general provisions of the entire measure. I find nothing in the Employers' Liability Act that would indicate that it was the intention of the Legislature that the same should be applied to persons engaged in Military service under the ordinary rules and regulations governing the same. Had this class been within the contemplation of the law making body at the time of the passage of the statute, it is highly probable, to say the least, that provision would have been made for the extraordinary liability that might be incurred as a result of

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such inclusion. A serious disturbance in any section of the State of such a nature as to require the presence of any considerable portion of the State Guards might naturally be expected to result in injury and perhaps death to a considerable number. To meet such a contingency the Act of 1912 makes no suitable provision, thus suggesting the inference that cases of this kind were not intended by the Legislature to be within the purview of the Act.

It is a well settled rule of statutory construction that repeal by implication will not be favored by the courts. Considering in connection with this general rule the underlying purpose of the Employers' Liability Act the conclusion seems unavoidable that Section 47 of Act 84 of 1909 is still operative. Under this Section full and adequate provision may be made for the families of those permanently injured or suffering death while engaged in Military service. The Act of 1912 under consideration before us was unquestionably designed to provide for the relief of those employes, and their families who were not, under the laws of the State, at the time of the passage of said Act, adequately protected. Construing the Act therefore in the light of the purpose for which it was passed additional strength is afforded to the conclusion that members of the National Guard are not affected by its provisions. I am strongly impressed that a contrary interpretation would do violence to both the spirit and the letter of the statutes.

Very Respectfully yours,
GRANT FELLOWS,
Attorney General.

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WARDS OF STATE—INMATES OF BLIND SCHOOL NOT EMPLOYES.

Opinion by the Attorney General:

The Employment Institution for the Blind was established in accordance with the provisions of Act No. 169 of the Public Acts of 1903. Undoubtedly the purpose of this Act was to provide for the instruction, care and maintenance of blind persons who are capable of receiving the instruction afforded by said institution and by their labor or services to earn in part at least the cost of their own support. I am impressed that none of the blind inmates of the institution regardless as to whether they are classed as apprentices, wards or wage-workers should be regarded as employes within the meaning of the Workman's Compensation Act. Clearly these inmates are not employes of the state in the usual sense in which the term is used; such people are not given employment with the idea of making a profit for the state out of their labor but rather that they themselves may be properly cared for in a state institution established for purely charitable purposes.

Very respectfully,
GRANT FELLOWS,
Attorney General.

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RULES OF PROCEDURE.

I.

SELECTION OF ARBITRATORS.

It is a maxim of the law that no man can act as judge in his own case, and this principle extends to and excludes all persons financially interested in the outcome of the case, together with their agents, officers, and attorneys. Persons so nearly related to any of the parties in an arbitration case that they may be fairly deemed to be financially interested in the decision are also excluded under this principle. The rule is therefore established by the Board that all persons who fall within any of the above named classes are disqualified from acting as arbitrators in cases to be heard before committee on arbitration under the Workmen's Compensation Law.

II.

POSTPONEMENT OF CASES.

The compensation law provides that arbitration be had in the locality where the accident occurred. This is for the accommodation of parties interested and to save expenses for travel and mileage for themselves and witnesses. In all arbitration cases one member of the Board goes to place of accident, frequently traveling hundreds of miles to hear the case. It is apparent under these conditions that a postponement of such hearings cannot be had, and it is necessary for the parties to be prepared for arbitration and to proceed with the same at the time and place set. Any other rule would make the administration of the compensation law expensive and ineffectual. The parties must also have their witnesses ready at the time and place set for arbitration so as to make their proofs complete.

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III.

INSURER DEEMED PARTY.

When arbitration is ordered in the case of any employer who is insured, notice of the time and place of such arbitration shall be given both to the employer and the company or organization carrying the risk; and a copy of the award or judgment on such arbitration shall be sent by mail from the offices of the Industrial Accident Board to such employer and also to the insurance carrier. In all such cases if an award of compensation is made it shall be against the employer and also against the insurance carrier, both of whom shall be deemed parties to such proceeding.

IV.

AGREEMENTS AND AWARDS.

In all cases where an award has been made, or agreement in regard to compensation entered into by the parties and approved by the Board, such award or agreement, as the case may be, shall continue in force until modified by the order of the Board, or by a written agreement of the parties approved by the Board. The employer may not stop or in any way change the rate of compensation provided for in such award or agreement except as herein provided. In cases where the employe returns to work at the termination of his disability the filing of the final receipt for compensation will be deemed an agreement terminating the period of disability.

V.

GROUNDS FOR DENYING LIABILITY TO BE STATED.

If the employer denies liability in case where a claim for compensation is filed by an injured employe or his dependents, such denial shall be filed with the Board in writing by

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such employer and shall set forth with reasonable detail and certainty the facts and circumstances upon which he relies as a defense to such claim. Upon the filing of such denial in the office of the Board, a copy of same shall be furnished to the claimant, so that he will have such seasonable information as to the nature and particulars of the employer's defense as may be reasonably necessary to enable him to procure witnesses and prepare for the hearing. Respondents will be limited to the grounds of defense so stated on the arbitration hearing and also on review before the full Board. Provided, that in exceptional cases and for good cause shown respondents may be permitted to amend such denial of liability, which is in the nature of a plea, but such amendment will not be allowed in cases where it would be inequitable or result in surprise to the opposite party. Failure or refusal to seasonably file such denial shall be deemed an admission of liability.[1]

VI.

WITNESSES AND PROOFS.

The arbitration is the first and fundamental hearing in contested cases, and is held at the place where the accident occurred in order to make such hearing reasonably convenient and inexpensive to the parties. The proofs should be fully taken at such arbitration, and such proofs in general form the record and basis for the hearing on review before the full Board. Where cases are taken before the full Board for review, additional testimony may be taken when necessary by deposition under the provisions of the general statutes of the State. The party appealing should furnish the Board with a copy or transcript of the proofs. Witnesses will not be heard orally before the full Board except on extraordinary occasions, and then only in cases where permission to produce and examine such witnesses has been granted by the Board on application prior to the date of the hearing.

[1]One of the fundamental purposes of this rule is to prevent parties from concealing their defense in a case until the opposite party has submitted his proofs, thereby misleading him to his injury.

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VII.

FULL BOARD HEARINGS.

Hearings on review and other matters coming before the full Board will be held at the office of the Board in the city of Lansing, except in cases where the Board deems it advisable that they be held elsewhere. On such hearings the time allowed to each side for argument or oral presentation of the case shall not exceed one hour, or thirty minutes on each side. In matters heard on petition before the Board, the time for oral argument is limited to one-half hour, or fifteen minutes on each side. In hearings on Stipulation and Waiver the time for oral argument will be the same as in cases heard upon review. Briefs or written arguments may be filed with the Board at or before the time of such hearing. If conditions seem to require it, the Board may permit the filing of briefs or written arguments within a limited time after the hearing on review. Either or both of the parties, as they choose, may present their case on such hearing by briefs or written arguments without being present at the hearing.

VIII.

CONTESTED MEDICAL AND HOSPITAL BILLS.

The provision of law authorizing the Industrial Accident Board to pass upon bills for medical and hospital services applies only in cases where there is a real, bona fide dispute. Before such matter can be brought to the Board for adjustment, the parties are required to make an earnest effort to reach a settlement of the matter between themselves, and may appeal to the Board only after they have exhausted the ordinary means of bringing about such settlement. In all matters of this kind which are brought before the Board, the person, firm, or corporation applying must show by satisfactory proof that they have made an earnest and adequate effort to reach a settlement, and that the settlement failed through no

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fault of theirs. Where bills of the above class are brought before the Board for adjustment by persons objecting to same, their objections will be considered only in cases where they have exhausted the ordinary means of reaching a settlement before making application; and in all cases where such bills are presented by claimants without having first exhausted the usual means of reaching a settlement, the same will be dismissed without prejudice and without investigation of their merits.

IX.

POSTPONEMENT OF HEARINGS.

At all hearings on review or petition before the full Board the docket is so arranged that the cases will follow each other in regular succession. The arbitration cases require a large portion of the time of the members of the Board away from Lansing, and when cases are set for hearing on review or petition such hearings must proceed in accordance with the docket and be disposed of. Parties may not stipulate to postpone such cases after the same are set for hearing, and postponement will be granted by the Board only in exceptional instances. In case any of the parties or their attorneys cannot be present or represented at such hearing, a reasonable time will be given to file a brief or written argument in the case.

X.

LUMP SUM PAYMENTS.

It is manifest that the clear purpose of the legislature was to provide that the compensation receivable under this law should go to the persons or families entitled to the same in weekly payments, it being the judgment of the legislature that when so paid it would more effectually meet and relieve the wants of the injured employes and their families, than if paid in a lump sum. This view has the full endorsement and con-

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currence of the Board. Therefore, lump sum payments will only be authorized in exceptional cases where circumstances create a necessity for such action. Application for lump sum payments can only be made after an "Agreement in Regard to Compensation" has been filed with and approved by the Board, or an award of compensation made; and such application is required to be in the form of a sworn petition setting forth in detail the facts and circumstances on which application is based. Desire of the applicant to go to another state or country, or to buy property, or to invest in business, etc., do not constitute reasons for lump sum payment. In general, conditions created by the acts of the injured employe or his dependents after the accident, do not constitute ground for such payment. As a general rule, the circumstances and conditions that will justify such payment are those existing prior to the accident or created by it, such as mortgage indebtedness on the home of the employe. In such case both the indebtedness and attendant conditions must be set forth in detail, and if secured by mortgage, the location and description of the property must be given, the name and address of the mortgagee, and the office or place where the mortgage is filed or recorded.

XI.

APPEALS TO SUPREME COURT.

In case an appeal is taken to the Supreme Court by certiorari, it is incumbent upon the appellant to prepare the return to such writ in much the same way that a bill of exceptions is prepared in cases appealed by writ of error. Such proposed return should be submitted to and served upon the opposite party, or his attorney, so as to give opportunity to prepare and submit amendments in substantially the same way as in settling bills of exceptions. The appellant at the time of serving the proposed return on the opposite party should serve such opposite party with notice of the time when the proposed return will be presented to the Board for settlement.

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This practice will give both parties an opportunity to be heard and to have all matters which they deem important included in such return. In cases where the proposed return is agreed upon between the parties, such agreement may be signified by a stipulation in writing attached to the proposed return.

XII.

OATH OF ARBITRATORS.

In all cases the arbitrators appointed by the parties shall, before entering upon their duties as such, be sworn by the chairman of the committee on arbitration, and shall subscribe the following oath to be filed with the other papers in the case, viz:

> "I, do solemnly swear that I will faithfully perform my duty as arbitrator in this cause and will not be influenced in my decision by any interest, or feeling of friendship or partiality toward either party, and that I am not attorney or agent of any of the parties, or financially interested in the result of the case, so help me God."

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MISCELLANEOUS RULINGS.

COMPENSATION FOR LOSS OF MEMBERS DOES NOT DEPEND ON LOSS OF TIME.

The injured employe lost two fingers, which under the provisions of the Michigan statute is deemed equivalent to disability for 65 weeks. He in fact returned to work some three weeks after the accident, resuming his accustomed occupation at the same wages as before the injury. The employer objects to paying the 65 weeks' compensation, and is of the opinion that the specific amount provided for the loss of said fingers should not be paid in this case because the employe is earning the same wages as before the accident.

By the Board: "Under the statement of facts in your letter the injured employe is entitled to receive $10.00 per week for a period of 65 weeks, such payments to be made weekly. The moment that the accident occurred, causing the loss of fingers as stated the company became indebted to him in the sum of $650.00, payable weekly as above, and his right to receive said sum in compensation for the loss of his fingers does not depend on his loss of time and whether he returns to work or the wages he receives thereafter. The law is so framed because of the fact that throughout the remainder of his life he will be deprived of the fingers so lost. The Industrial Accident Board has no authority to either vary or waive the expressed provision of this law. The law imposes upon the Board the duty to see that the law is carried out in every respect, and does not permit any compromises to be made. While the injury may not keep the employe from his work for any considerable length of time, still the injury will result in his being handicapped by being deprived of the fingers so lost for the remainder of his life, and the law expressly fixes the sum that he is entitled to receive as compensation for such loss without reference to his employment or subsequent relations to his employer."

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PLACE OF MAKING PAYMENT.

Questions as to the manner and place of making weekly payments under the compensation law to injured employes have arisen in so many cases, a general ruling by the Board on the point seems desirable. In some instances complaint is made by persons receiving compensation that they are required to go an unreasonable distance to the place of payment designated by the employer, and that much time and effort each week is thus expended in going to and from such place of payment. The compensation law is silent as to the place of payment, the language of the statute being, "The employer shall pay or cause to be paid to the injured employe, etc." The obligation to make payment being imposed by law on the employer without specifying the manner and place of payment, the common law rule established in Michigan and elsewhere would apply, and this rule requires that payments be made at the place where the person entitled to receive such payment resides. 30 Cyc, page 1185; McIntyre vs. State Ins. Co. 52 Mich. 194.

It is the opinion of the Board that all friction on this point should be avoided as far as posible by mutual arrangement between employer and employe as to the place of payment, and that neither should be arbitrary or unreasonable in the matter. Pointing out in this manner the legal rights of the employe entitled to receive weekly payments of compensation will no doubt cause the removal of any arbitrary requirements by employers as to the place of payment, and thereby remove the apparently needless friction that has arisen in that regard.

Some employers and some of the liability companies have already adopted a payment voucher, similar in kind to those which have long been used by fire insurance companies for payment of losses, having attached duplicate receipts. The payee must indorse the voucher and sign the receipts before the same can be cashed, and in practice the genuineness of such signature is in most cases guaranteed by local banks and business men through whose hands the voucher passes. When

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the voucher is returned paid, one of the receipts can be filed by the employer and the other sent to the Industrial Accident Board. This plan seems to furnish a system for making payments of compensation through the mails which is apparently safe and satisfactory to all parties.

PAYMENT OF COMPENSATION TO MINORS.

The question has been frequently raised before the Industrial Accident Board as to whether a guardian should be appointed before payment of compensation can be made to an injured employe who is under 21 years of age. A large number of cases have arisen where the injured employes are minors and in some of these cases the injuries were comparatively slight and the compensation would scarcely more than pay the expense of a guardianship. The Board has carefully examined the provisions of the statute upon this point, and has reached the conclusion that in the majority of cases at least the compensation should be paid direct to the injured minor. The provision of the law upon which this conclusion is based is found in subdivision 2, section 7 of part 1 of the act, and is as follows:

> "Including minors, who are legally permitted to work under the laws of the State, who, *for the purposes of this act, shall be considered the same and have the same power to contract as adult employes.*"

The evident purpose of this provision of the statute was to avoid all unnecessary delay and expense to minors in the collection of and receipting for compensation to which they might become entitled. This, of course, contemplates that the payments of compensation will be made strictly in accordance with the statute, in weekly installments, and will go to the injured minor in substantially the same manner in which his wages were paid before his injury, without the intervention of a guardian or trustee. In cases where any question arises between the injured minor and his parents, we think the matter can be readily arranged so as to have the receipts for compen-

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sation signed by the parents as well as by the injured minor. It seems to be the plain intention of the act to make the payments of compensation to injured minors a matter as simple and expeditious as was the payment of their wages before the injury.

The provisions of section 14, part 3, of the Compensation Law are not necessarily in conflict with the above construction. The latter section was intended to apply in cases where the injury resulted in the mental incompetency of the employe, and in death cases where the dependents are minors, as in these cases a guardian or next friend would be clearly necessary. The legislature has power to fix the age at which a person becomes competent to enter into contracts and transact business, and there seems to be no legal reason why that age should not be fixed below 21 years with reference to the operation of this particular act and collection and receipting for compensation thereunder.

LOSS OF USEFULNESS OF MEMBER.

The question in this case relates to the payment of a specific amount for the loss of a portion of a finger, claimed to be less than one phalange. The employer contended that the point of amputation was controlling.

By the Board: The action of the surgeon in amputating a finger, or in failing to amputate it, or in choosing the point of amputation is not controlling in all cases of this kind. Each case depends for its decision upon the particular facts relating to the finger, and these might relate to the point of amputation, or the fact that the finger or a portion thereof had been rendered useless without being amputated. The statute relative to the loss of the first phalange cannot reasonably be construed to apply only in cases where the finger in unjointed and the amputation is precisely on the joint. The place of amputation should be determined on the principles of what constitutes good surgery, the controlling thought being to obtain the best result for the injured person. This might result in

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the point of amputation being a little below or a little above the first joint. If the loss, in case of such amputation, is substantially the first phalange, it should be treated as such even though in some cases it was a trifle more and in others a trifle less. The real test in such cases is, as to whether, by reason of the amputation, the injured person has lost all that is useful of the first phalange. The Board is further of the opinion that in case no part of the finger is amputated and the injury is such as to entirely destroy the usefulness of the first phalange or the entire finger, in that event the injured person has lost the first phalange or the finger, as the case may be, as completely as if the same had been amputated.

PAYMENT OF HOSPITAL EXPENSE AFTER FIRST THREE WEEKS.

In this case the injured employe was being treated at the hospital and could not be discharged at the end of the first three weeks. The hospital authorities wish to know the source from which they are to be paid for further service rendered. The employer writes as follows: "It was agreed that we withhold payment of the weekly compensation until such a time as the injured could be discharged. We would then pay the first three weeks ourselves, and for the remaining time we would pay the hospital from the amount of the employe's weekly compensation, and then turn over to him the balance, if any."

By the Board: "The Industrial Accident Board feels that your suggestion to withhold payment of weekly compensation and to pay hospital and medical charges after the first three weeks therefrom, and then turn over the balance, if any, to the injured employe, cannot be approved. If you will consider for a moment the rights of the injured man granted to him by the statute, we think that it will be apparent that neither your company nor the Industrial Accident Board have any power to expend or appropriate the money to which he is entitled for compensation. The law provides that this compensation shall be paid direct to the injured man and this Board has no power to divert such payment from him or authorize

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it to be done. We think that the payment by you of any part of this compensation to the hospital, or to the doctors or others, would be no defense to a claim for such compensation that the injured man might afterwards assert against you. He is entitled to payment of compensation without waiting for his recovery or for an adjudication of the amount, and if it is paid he will in most cases be able to make provision for his treatment and care."

MEDICAL AND HOSPITAL TICKETS.

Under the law the employer is liable for the first three weeks medical and hospital service and medicine, when the same are needed. The employer cannot avoid his duty in this respect by deducting from the wages of his employe small sums of money at intervals to pay for a hospital ticket or membership in a hospital or medical association which is to furnish the above service in case of accident. The effect of such procedure would be to shift the burden of paying for such service from the employer to the employe. In this case the hospital ticket was paid for by money deducted from the wages of the employe, and when injured, the medical and hospital service was furnished through said ticket and membership. The physicians and hospital have already been paid through the ticket, and therefore they have no further claim. The employe in fact paid for the hospital and medical service, and the fact that he paid for the same through a hospital ticket or some hospital organization, is no concern to the employer. The employe bought and paid for it, and owned it as much as his coat or hat. It therefore seems to leave the plain question of the employer paying to the injured employe the reasonable value of the medical and hospital treatment which he received during the first three weeks following the injury. The employer is liable for the payment of the same, in the opinion of the Board, and the case is not essentially different from what it would be if the injured employe had in fact paid the regular rates for such hospital and medical service at the time the same were furnished.

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MINERS RECEIVING PART PAY IN SUPPLIES.

Miners in the coal region are accustomed to buy supplies from the company. A form of ticket is issued and the amount of purchases is deducted from the miner's earnings. When supplies are purchased from time to time the amount is punched in the ticket. Question: Is the rate of compensation in case of an injury to a coal miner to be based on his earnings less the cost of supplies so purchased?

By the Board: "As a general proposition, the amount of money the miner is entitled to receive for the work he does constitutes his wages or earnings. If he gets from the company during the week articles of clothing, tobacco, etc., and the same are charged against and deducted from his wages for that week, this would not constitute a reduction of the amount of money earned by the miner during the week, but would merely be the spending of a portion of the amount earned. In general, it seems that this same rule would apply to other and different articles furnished a miner from the company's store and charged and deducted from his wages. This might perhaps be modified by the contract or scale in force between the miners and the company, if there are any agreements in such scale that would have the effect of causing such modification, which we do not asume to decide. There may be special circumstances also in some cases, and in all disputed cases the parties on both sides will be given a full hearing both on the facts and the law, before the Board will render a final decision."

RE-EMPLOYMENT NO PART OF SETTLEMENT.

After the employe in question recovered from a serious injury a settlement was proposed for less than the full amount of compensation provided for in the law, the further consideration for such settlement being that the employe was to be reinstated by the employer to the position which he occupied before the injury. When this proposed settlement was submitted by the employer, approval was refused for the following reasons:

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By the Board: The matter of reinstating an employe to the position he occupied before the injury should not enter into the matter of settlement and cannot, under the law, be in any way considered by the Board. When an accident occurs to an employe as in this case, causing the loss of certain fingers, the employer immediately becomes indebted to such injured employe for an amount fixed by the law, which indebtedness it becomes his duty to honorably discharge by payment. In such case, if the employer discriminates against the injured employe by refusing to reinstate him because he insisted on the payment of the amount so due him for the injury, such action would be morally and legally wrong.

LUMP SETTLEMENT DURING DISABILITY.

The employe's hand was severely injured and the ultimate result of the injury uncertain. The employe and employer desire to enter into an agreement as to the probable period of disability and make settlement therefor by a lump sum payment. Held that the Board will not approve settlement where period of disability is presumed or estimated.

As a result of the injury, the employe's right hand has been rendered practically useless, but there is a prospect of making the hand useful, and perhaps as good as ever, by a surgical operation. However, the Board cannot act upon probable results of such operation, and cannot make an order that will discharge entirely the employer from liability upon any showing as to the prospects of removing the disability that now exists. Time alone will determine whether such disability can be removed. The Board advises that the employer advance enough money to defray the expense of the proposed operation. If such operation is successful and removes the disability both the employer and employe will be benefited.

PARTIAL DISABILITY; DUTY TO SEEK EMPLOYMENT.

An employe who is recovering from an injury, and who has recovered so far that the disability is only partial, cannot reasonably be required in his partially disabled condition to go

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among strangers looking for work. Such requirement would not be reasonable, and the probabilities of his obtaining work if required to so seek it would be very remote. On the other hand if his employer has work suitable for him to perform in his partially disabled condition, and which he can do without causing suffering or inconvenience, and offers to give him such work, then it is the duty of such employe to accept the work tendered and thereby reduce the liability for compensation. That if the employer has no such suitable work, or having such work fails to tender it to the injured employe, the compensation cannot be reduced upon the theory that there are classes of work which he is able to do and which he might obtain perhaps if he diligently sought for it, and which on the other hand he might not be able to obtain at all.

METHOD OF PAYING COMPENSATION FOR LOSS OF MORE THAN ONE FINGER.

Injured employe lost index (35 weeks), second (30 weeks) and third (20 weeks) fingers. Question raised as to whether payment should be made at the rate of 50% of wages for each finger each week or 50% of salary for 85 weeks. Held, that latter is correct method.

The Industrial Accident Board has considered the question as to the manner of payment in a case where three fingers are lost by an accident to an employe. The conclusion reached by the Board is that the rate of payment in such a case is one-half of the weekly wages of such employe, and that the number of weeks for which such weekly payments shall continue is to be determined by the number of fingers and the schedule of compensation for the particular fingers lost. There is no provision of law by which more than Ten ($10.00) Dollars per week could be paid, and this fact would make improbable and unworkable the theory that weekly payments for each finger lost should be made each week, continuing until the claim of the less valuable fingers drop out of the account, and until the one most valuable is fully paid for. The same rule would apply in case of toes or other members.

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PAYMENTS TO BE MADE WEEKLY.

The Board has carefully considered the question raised by a considerable number of employers of labor in the State, as to whether payments of compensation under the law may not be made monthly or bi-weekly instead of being made in weekly payments. The provision of the law is plain requiring such payments to be made weekly. There is no power vested in the Board to suspend or modify this provision of the law or to substitute for it bi-weekly, monthly or quarterly payments. From the language used throughout the Act, it seems apparent that the clear purpose of the legislature was to provide that compensation receivable under this law should go to the persons or families entitled to the same in weekly payments, and that it was the opinion of the legislature that compensation paid weekly would more effectually meet the wants and relieve the distress of injured employes and their families than if a greater interval of time elapsed between such payments. The question of changing the time of making payments is one for the legislature, if there is real ground for complaint on account of the present provisions.

COMPENSATION NOT PAYABLE TO ADMINISTRATOR.

There is no provision of the compensation law authorizing the payment of compensation in death cases to an administrator of the estate of a deceased employe. The statutes of this state commonly known as the "death act" and as "survival act" expressly provide for suit and recovery by an administrator in cases brought for causing wrongful death, under the above acts respectively, but this right of the administrator is created by such statutes. Such administrator has no right to claim or receive any compensation payable under the Michigan Workmen's Compensation Law. The act expressly provides that in death cases the compensation shall be paid to the dependents of the employe, and such payments shall be made direct to them without the intervention of an adminis-

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trator or trustee. In case any of such dependents are minors or mentally incompetent, a guardian may be appointed by the proper Probate Court.

PARTIAL INCAPACITY AFTER FOURTEEN DAYS.

The employe was totally incapacitated for fourteen days and returned to work on the fifteenth day at a reduction of wages. He has received 50% of his loss in salary for six weeks and the question that arises is, should he receive compensation for the first two weeks, and if so, how much?

It is the opinion of the Industrial Accident Board that inasmuch as the incapacity resulting from the accident (part being total and rest partial disability) continued for more than eight weeks, as it did under the statement of facts, the employe would be entitled to compensation for the first two weeks under Section 3 of Part II of the Act. Inasmuch as the disability for the first two weeks was total, it is the opinion of the Board that for said first two weeks he should receive compensation for total disability.

VIOLATION OF SHOP RULES.

It is the opinion of the Board that a mere violation of rules or instructions of the employer would not constitute wilful and intentional misconduct within the meaning of the act. It would have to be shown at least that the violation was intentional and wilful, and not through inadvertance or inattention. The question as to what constitutes wilful and intentional misconduct, will in most cases be a question of fact, depending upon the nature of the act complained of and the circumstances surrounding the particular accident.

POSTING OF NOTICES BY EMPLOYERS.

On the question of posting notices, no fixed rule can be laid down that will be applicable to the infinite variety of circumstances and conditions found in the various industries of the

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state. The employer should in good faith endeavor to so post these notices as to effectually bring to the knowledge of his employes the fact that he is operating under the workmen's compensation law. The provisions directing the manner and place of posting notices found in Sec. 6, Part 1 of the law shall be closely followed, and will be found applicable to the situation in most industries.

POSTING OF NOTICES BY MUNICIPALITIES.

It is the opinion of the Board that the posting of notices in case of the erection of a building or other work done by a municipality, is not required or contemplated by the law. The municipality comes under the provisions of the law not by *election* but by force of the statute itself. All persons dealing with a municipality are bound to take notice of this fact, just the same as they are bound to take notice of any other law which by its own force becomes binding and operative. The office and purpose of the notices to be posted under certain provisions of the law is to bring to the employe knowledge and notice not of the law itself, but of the action taken by the employer, to-wit, his election to be subject to its provisions.

OFFICER OF A CORPORATION MAY BE EMPLOYE; PARTNER, NOT.

The question whether an officer of a corporation who is employed by it as a workman is entitled to compensation if injured, is raised in this case.

The employer is the corporation, which is the artificial person created by law, and which is a distinct entity entirely separate and different from its officers. The injured man under the facts shown in this case was working as engineer and general all-round machine man, was receiving wages for his work, which were paid by the corporation. The fact that he also held the office of Vice-President in the opinion of the

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Board would not in any way effect his right to compensation. The term "employe" is defined in Section 7, Part I of the Act as *"Every person in the service of another under any contract of hire, express or implied, oral or written."* There seems to be no question but that the injured man was at the time of the injury in the service of the corporation under a contract of hire.

The rule is different in cases where the injured man is a member of a partnership, because there the partners are in fact the employers and each separately must be treated as an employer rather than an employe.

MUNICIPALITIES, INSURANCE BY, OPTIONAL—MAY INSURE PART.

The question is raised as to whether a county may take out insurance covering only a portion of its employes, for instance its County Road Department.

By the Board: "A municipality comes under the operation of the Workmen's Compensation Law without filing an acceptance, the Law being compulsory as to it. The municipality is not required to carry any insurance, but may insure all or any portion of its employes as it may desire. There is no objection whatever from a legal standpoint to the County Road Commission carrying insurance covering its employes. The insurance carrier in such case would be liable only in case of the injuries to the class of employes covered by the contract of insurance.

STATUS OF FOREIGN CONSULS IN COMPENSATION CASES.

The leading authority on the status of foreign consuls in death cases is Rocca v. Thompson, 223 U. S., 333. This case was decided by the United States Supreme Court on February 19, 1912. It came up from the State of California and was

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argued and briefed by able counsel. The point at issue was whether the Italian Consul or the Public Administrator of California was entitled to administer the estate. The treaties are cited and construed, the general rule being that the treaty provision itself gives authority to the consul to act only in cases where there is no known resident heir, executor or trustee, and then said right is to intervene, protect and preserve the estate until proper administration can be taken out in the local courts, and to intervene in such administration for the purpose of safe-guarding the rights of foreign subjects. It holds that there is no right of administration in the foreign consul without a judicial grant of such authority, and this rule applies to all treaties with all of the foreign countries, inasmuch as most of them contain the "most favored nation clause" under which one country is entitled to claim all of the rights and privileges granted to any other nation by treaty.

As conclusive on the right of administrators it is stated on page 333, that in 1894 the Italian Ambassador took up with the United States and urged a treaty arrangement under which the Italian Consuls in the United States be authorized to administer and settle estates of their deceased countrymen. Edwin F. Uhl of Grand Rapids, Michigan, was then Acting Secretary of State and declined to favorably consider such proposal, his action being based mainly upon the following grounds, viz:

(1) That the administration of estates in this country is under the control of the respective states, and for that reason the proposed international agreement should not be made.

(2) That the practical difficulties made it inadvisable, such as the fact that the consular officers are often remotely located from the place where the estate is situated.

The latter consideration is entitled to much weight in the practical determination of the question, as appears from the fact that one consul residing at Chicago handles 13 states and that the foreign consuls handling the upper peninsula of Michigan reside either in Duluth, Minneapolis, or Chicago.

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ELECTION—WHEN EMPLOYE SUBJECT TO LAW.

We have examined the provisions of section 8 as to the employe being subject to the provisions of Act No. 10 of Public Acts of 1912, with special reference to the thirty-day provision in subdivision 2 thereof.

Our conclusions are as follows:

That the acceptance of the employer is a first requisite to the employe coming under the act. In addition to the acceptance by the employer the following is required in order to bring the employe under the provisions of the act:

(1) That employe did not at hiring give notice in writing of election to to be subject to act; or

(2) In case of any old employe, whose contract of hiring antedates the employer's acceptance, such employe gives notice in writing of election to be subject to the provisions of the act; or

(3) In case of an old employe as above, after employer has accepted and posted notices, continuing to work without expressing his election either way for a period of thirty days or more.

The evident intent of the law is as follows:

(a) Where a man comes to a factory working under the act with notices posted, etc., seeks and secures employment, walks into the shop and sees the posters, and does not go back to the office and sign and serve a notice that he elects not to come under the act, is deemed to have accepted it and acquiesced to the conditions of employment in the institution where he goes to work.

(b) In case of an old employe working in a shop, and while so employed notices are posted announcing that the employer has accepted the law, etc., if the foreman comes round and passes out his blank acceptances to be signed by the men who desire to come under it, and the employe signs it and files with the employer his written acceptance of the law, then such employe is subject to the law, and becomes subject to it from the time he signs and delivers to his employer such acceptance.

(c) That in case of an old employe, who when notices are posted in the shop as above, continues to work without giving

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notice that he *will be subject* or that he *will not be subject* to the law, and so continues to work for a period of thirty days, then his action in continuing to work for such period of time is equivalent to an actual acceptance, and he is deemed subject to the law. But if he is injured after having continued to work twenty days as above, then we think he would retain the right to decide whether to make claim under the Common Law or under the Compensation Law. If he made claim under the Common Law and brought suit, the employer would retain his former defenses, the same as if the employe had made his election not to come under the act before the time of his injury.

PRACTICE IN ARBITRATION CASES WHERE APPLICANT DOES NOT APPEAR OR IS WITHOUT EVIDENCE.

Section 8 of Part III of the Compensation Law provides that "The committee of arbitration shall make such inquiries and investigations as it shall deem necessary," at the time and place set for arbitration. The failure of the applicant to appear or produce evidence does not dispose of the matter or preclude the committee from calling witnesses, taking proofs and making inquiry and investigation as to the merits of the claim. In such case the proper course is for the respondents to produce their witnesses and make a full showing on the merits so that a decision of the case on the merits may be had. If respondents refuse to do this and insist upon a dismissal of the case, the same may be reset for arbitration at a later date if in the opinion of the Board such course is proper.

CLAIM FOR COMPENSATION—PHYSICAL INCAPACITY TO MAKE.

In the case of *Podkastelnea* vs. *Michigan Central Railroad Company* the principal defense was based upon the failure of the applicant to make claim for compensation within six

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months after the accident. It appeared in the evidence that for several weeks after the accident the applicant was confined to the hospital, most of the time being in bed and under the care of doctors and nurses. That claim was made within six months after he was able to leave the hospital, but not within six months after the occurrence of the accident. The clause providing for the six months limitation is Section 15, Part II of the Act, which contains the following exception:

"in the event of his physical or mental incapacity, within six months after * * the removal of such physical or mental incapacity."

The incapacity referred to is of two kinds viz., "physical" or "mental." A proper construction of the section requires that both of these words be given effect, and by giving effect to the phrase "physical incapacity," it must be held that the six months period did not commence to run until the applicant was physically able to make out and deliver the claim to respondent. This brings the claim within the six month limitation and entitles the applicant to compensation.

FOREIGN DEPENDENCY—PAYMENT OR TRANSMISSION OF MONEY THROUGH CONSULS.

The matter of the payment and transmission of money to foreign dependents and the function to be performed by the consuls in relation thereto was found to be an important problem, and for the purpose of reaching a reasonable and satisfactory basis for the handling of matters of this kind, invitation was extended to all foreign consuls having jurisdiction in Michigan to meet with the Board for a full discussion of the entire subject. A largely attended meeting was had and after thorough consideration and discussion of the matter the following plan was approved:

(1) That in cases where a duly authenticated power of attorney to the consul is filed, that payment in the first instance be made to the consul, taking his consular receipt therefor duly authenticated by his consular seal attached thereto, and to file the same with the Industrial accident Board.

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(2) The consul thereupon to transmit the money through the usual governmental channels the distribution and payment to be made to the dependents by the local county courts where the identity of the persons will be proven to the Court and certified by the judge, and the receipts signed by the dependents procured through such courts and properly certified and authenticated through the consulate to be filed with the Board, the latter receipt to be the final receipt accepted in settlement of the matter.

(3) That in case of the failure of any consul to procure and file the final receipts aforesaid the Board will direct that no further payments of money be made through him in any cases.

(4) That the above applies only in cases where duly authenticated power of attorney is given to the consul. In cases where the parties in interest give power of attorney to somebody other than the consul, we are of the opinion that we should recognize the party so chosen, using reasonable precaution in seeing that the interests of the persons dependent are protected. It was conceded by all of the consuls that the dependent had the right to choose the person who would represent her and that ordinarily the Board would have no right to disregard her choice.

(5) That in cases where two different persons have filed powers of attorney, both claiming the right to recognition, the matter is easily adjusted by having the dependent choose which of the two will be retained as her representative. This can be done by revoking one of the powers of attorney and leaving the other one in force. It is not the function of the Board to decide between rival claims of this kind, but merely to put the question up to the dependents to make such choice by executing and filing a proper revocation of one of the powers of attorney.

FOREIGN DEPENDENTS—LETTERS ROGATORY AND PROOFS, PRACTICE IN.

The following practice in the above cases is approved and established by the Board:

(1) In case it is necessary to take the testimony of witnesses in a foreign country, the person desiring such testimony shall apply to the Board for the issuance of letters rogatory by petition to which shall be attached the interrogatories which he desires to have propounded to the witnesses whose testimony is to be taken; he will also attach thereto a copy of the order proposed in the case, and shall serve copies of all of said papers upon the opposite party or his attorney, the time for such service to be the same as provided in the Circuit

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Court rules of Michigan. A notice should also be attached to the papers so served stating the time when the same would be presented to the Board for issuance, and further stating that the opposite party may propose and submit at the time aforesaid cross-interrogatories to be attached to said letters, and propounded to the witnesses whose testimony is to be taken.

(2) That at the time fixed in said notice such original petition with proof of service attached thereto may be presented to the Board, and also any proposed cross-interrogatories, or objections or motions whether made orally or in writing, and the same will be passed upon by the Board.

(3) The Board will issue as of course such letters in all cases except where substantial reasons are affirmatively shown against said issuance, the same to be authenticated by the Secretary of the Board signing the same and attaching the seal of the Board thereto. That in such cases the cross-interrogatories proposed by the opposite party will be attached to the letters as of course except where it is made to appear that they are impertinent or irrelevant.

This gives the opposite party an opportunity to be heard and to submit cross-interrogatories to be propounded, and while under the notice to be served such opposite party need not appear, still it affords him full opportunity to so appear and be heard.

FOREIGN DEPENDENTS—POWER OF ATTORNEY—HOW EXECUTED.

In all cases of foreign dependency, the original Power of Attorney should be made in the language and upon the forms of the country where such dependents reside. It should be acknowledged before the proper local officer, having authority to acknowledge and certify such papers, and should be authenticated by the seal of the American Consul. Accompanying same and attached thereto should be a translation of said Power of Attorney into English, and attached also should be an affidavit made by the translator, (who should be a person within reach and responsible), stating that the translation annexed was made by him and that same was carefully and correctly made, and that it is a true and accurate translation of

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the Power of Attorney. A proper way to designate these would be to state in the affidavit that the original Power of Attorney is attached hereto and marked "Exhibit A," and that the translation is attached hereto and marked "Exhibit B." In all cases where the Power of Attorney does not comply with this rule it should be returned for correction, or at least called to the attention of the Board before further action is had on same. Generally the Board will not accept or act upon a Power of Attorney executed in a foreign country which is written in English, or upon blanks printed in English.

DEATH—AFTER APPROVAL OF AGREEMENT IN REGARD TO COMPENSATION.

In cases where an agreement in regard to compensation is made and approved by the Board, and afterwards death of the injured person follows resulting from the injury, a new right of action arises from the death in favor of the widow or others who may be dependent. This cause of action did not exist until the death, and arose from the death, and is in no way affected by any agreement or action of the deceased, except that the amount of the payments of compensation that he actually received prior to his death are to be deducted from the 300 weeks' compensation payable in death cases.

In disputed cases where it is contended that the death was not the result of the injury, or where other defenses are interposed, the widow or the dependents are entitled to make application for arbitration, as the case is an original one and not affected by the agreement in regard to compensation made by the deceased before his death.

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LATE DECISIONS BY THE SUPREME COURT[1]—JUNE AND JULY, 1916.

SUPREME COURT.

ASAPH HILLS,
Claimant and Appellee,
vs.
THE OVAL WOOD DISH COMPANY
and
MICHIGAN WORKMEN'S COMPENSATION MUTUAL INSURANCE COMPANY,
Respondents and Appellants.

LATENT DISEASE—RETARDING RECOVERY.

Claimant while employed in the saw mill of respondent received an injury to his right arm by which the flesh was bruised and the front part of the arm denuded of its skin, exposing the blood vessels and muscles underneath. The injury did not heal properly and claimant continued to remain in a disabled condition. Respondents filed petition to be relieved from making further payments on the ground that claimant's continued disability was due to a disease in the system.

HELD: That the Compensation Law does not make exception for cases of injured men whose health is impaired or below the normal standard. That it does not exclude from its benefits the man who carries in his body a latent disease which, in case of injury, may retard or prevent recovery.

Certiorari to the Industrial Accident Board to review the order denying respondents' petition to be relieved from paying further compensation. Affirmed.

[1]The opinions under the above heading were handed down by the Supreme Court after the type was set and printing for this volume nearly completed.

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Robert R. Gale, of Muskegon, for claimant.
Beaumont, Smith & Harris, of Detroit, for respondents.

PERSON, J. While claimant was employed in the sawmill of the Oval Wood Dish Company, at Traverse City, he met with an accident by which his right arm was injured above the elbow. As found by the Industrial Accident Board, "the flesh was bruised and torn, and the front part of the arm denuded of its skin, exposing the blood-vessels and muscles underneath." An agreement for compensation was reached and approved, and payments were made in compliance therewith for a period of nineteen weeks. At the end of that period the payments were discontinued, and presently the respondents filed with the Industrial Accident Board a petition asking that they be relieved from making further payments upon the ground that claimants' continued disability was due to a venereal disease, viz., syphilis, which retarded the healing of the injury. The claimant filed an answer to this petition in which he denied that he had ever contracted such disease, or been afflicted with it. And we do not understand it to be claimed that he was suffering from syphilis in any active stage. As found by the Industrial Accident Board:

"The evidence in this case does not suggest any active disease in applicant's body prior to the injury, nor does it disclose any substantial evidence of the existence of a bodily disease except the fact that the wound did not readily heal and that symptoms led the physicians to suspect syphilis in the blood, together with some evidence that a Wasserman test of the blood was had and that such test showed the presence of syphilis. In this connection it should be said that the essential part of the evidence as to the Wasserman test is hearsay, as it consisted merely of an unsworn report sent by mail from the Lincoln-Gardner Laboratories in Chicago, where a sample of applicant's blood had been sent to be tested."

Under this state of facts it is urged that an order should have been made by the Board relieving the respondents from payment of further compensation, and the argument in sup-

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port of such contention is stated in the brief of their counsel, as follows:

"The Compensation Act does not assume to pay for any period of disability beyond that which is traceable to the injury, either directly or indirectly. The case is to be distinguished from the cases where the accident has aggravated or accelerated a pre-existing disease. It has been held, under the English Act, that where the injury aggravates a disease, the increased impetus given to that disease being a result of the injury, the disability caused thereby must be compensated for. But upon the record in this case there is no question of the acceleration of the syphilitic condition. Syphilis from its very nature is not accelerated by a cut or a bruise but its presence on the other hand retards the healing of the cut. We may assume that upon an accident the employer is bound to compensate for the results of the injury and must be assumed to have accepted the employee in whom is a constitutional disease, the ravages of which are increased by the injury. But this does not go to the extent of saying that when the disease prevents the healing of the injury, or in other words this new cause supervenes the injury as a cause of the disability, the industry that contracted only to pay for the disability resulting from injury should pay this additional compensation.

"We think it is clear without further argument that if the line can be drawn between the period of disability caused by the accident and that caused by the disease, no question would be made but that compensation would only extend over the period caused by the accident.

"But even if this period cannot be absolutely segregated, still we contend that the proper rule that should be applied is that compensation 'should be allowed only for the period for which the injury complained of would disable a person of average condition not suffering' from the disease."

The Board made no definite and specific finding as to whether, as a matter of fact, the period of claimant's disability was or was not being extended by the presence and action of the disease, but declined to relieve the respondent from further payments, for the following reason stated in the written opinion which it filed:

"The legal question presented by the petition is an important one. If the correct rule for determining the length of time compensation for disability should be paid in case of an injury of this general character is found to be the one contended for by respondents, the

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result will be far-reaching. The question then to be determined in cases of continuing disability would be whether the injury *should have* healed, or whether it should have healed *more quickly* than it did, instead of the actual resulting disability. Instead of the plain question of fact as to the nature and duration of the disability which the injured man actually suffered, it would present for decision the question as to how much he should have suffered, and how soon he should have recovered, upon the theory that only a part of the disability was due to the injury and the remaining part due to disease. In the opinion of the Board, the respondents' contention must fail. The Compensation Law does not fix any standard of physical health, nor does it make any exceptions for cases of injuries to men whose health is impaired, or below the normal standard. Neither does it except from the benefits of the law the man who carries in his body a latent disease which, in case of injury, may retard or prevent recovery. The law by its expressed terms applies to every man who suffers disability from injury. It does not exclude the weak nor the less fortunate physically, but was intended for the working men of the state generally, taken as they are.

"The authorities seem to be strongly against respondent's contention:

> Boyd's Workmen's Compensation, Sec. 463;
> Bradbury's Workmen's Compensation, (2d Ed.) 385 and 386;
>
> *Willoughby* vs. *Great Western Railway Company*, 6 W. C. C. 28;
> *Ystradowen Colliery* vs. *Griffiths*, 2 B. W. C. C. 359.

"This is not a case where the workman was suffering from some active disease or injury at the time of the accident, as applicant was apparently in good health in every respect up to the time he received the injury. The difficulties of proving the reasonable duration of disability which should result from an accident is discussed to some extent in the English cases above cited, pointing out the fact that *Ward* vs. *London & Northwestern Railway Company*, 3 W. C. C. 193, which attempted to make such determination, is no longer regarded as authority. They further suggest the danger of attempting to fix the duration of disability on medical prognosis and opinion evidence, when it is conceded by the medical profession itself that it has yet much to learn in such matters."

We agree with the Industrial Accident Board that, under the circumstances of this case, the Act does not contemplate any such apportionment of the period of disability as respondents ask for. Assuming that such disability is being prolong-

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ed by the disease, there is yet no point at which the consequences of the injury cease to operate. It is the theory of respondents, not that the consequences of the injury cease, but that they are prolonged and extended. There is no part of the period of disability that would have happened, or would have continued, except for the injury. The consequences of the injury extend through the entire period. And so long as the incapacity of the employe for work results from the injury it comes within the statute, even when prolonged by pre-existing disease.

The order of the Industrial Accident Board is affirmed.

SUPREME COURT.

MARY BAYER,
Claimant and Appellee,
vs.
CHARLES F. BAYER,
and
UNION CASUALTY INSURANCE COMPANY,
Respondents and Appellants.

INSURANCE CARRIER—LIMITATION OF POLICY.

Where the policy limits the insurer's liability to injuries of employes of the assured occurring while engaged in certain specified labors, the insurer cannot be held liable for an injury to an employe while engaged in undertakings which are clearly outside those specified in the policy.

Certiorari to the Industrial Accident Board to review an award made against both respondents. Modified as to insurer.

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Edward S. Grece, of Detroit, for claimant.
Walters & Hicks, of Detroit, for respondents.

There was testimony to support the finding that claimant's decedent and husband was employed by respondent Charles F. Bayer and upon his business when he was killed. Whether the risk was one assumed by respondent Union Casualty Company is the debatable question.

Respondent Union Casualty Company issued to respondent Charles F. Bayer its policy of insurance. Upon the policy is a rider which reads:

"The policy to which this endorsement is attached is extended to cover, and the undersigned company does hereby agree to assume and perform each and every obligation imposed upon the assured by Act No. 10, Public Acts, Extra Session, 1912, State of Michigan, and the election of the assured thereunder that is required of the assured to do and perform on account of personal injuries (including death resulting therefrom), sustained by any employe or employes of the assured while this policy is in force, and arising out of and in the course of his or their employment by said assured, in the operation of and in connection with the business herein stated."

The business of the insured is stated in the policy as follows:

"Place where the work is to be done: State of Michigan. Kind of work to be done: Contractors, buildings wooden, or frame private residences, flats, apartment, flats with stores underneath, one story stores and stores with offices above, private stables and private garages, exclusively, and buildings not mercantile or factory; all not exceeding three stories and basement in height, including jobbing work connected therewith; no blasting. This classification does not include the erection of churches, theatres, or buildings intended for city and county or municipal use, such as court houses, city halls or capitol buildings."

The policy is not returned, and we have no further information about its terms. It is contended that claimant's decedent was not killed while performing any duty in connection with the said business. The facts may be briefly related.

Claimant's decedent was the father of Charles F. Bayer,

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was employed by him and by no one else. Sometimes he was employed in and about the business described in the policy of insurance. Charles F. Bayer owned a horse and wagon and this, his father driving the horse, was sometimes employed in the said business. Charles F. Bayer had a brother, William, a painter. This brother was not his partner nor, except upon contract relations, employed by Charles F. Bayer. He did business upon his own account, working for others as well as for his brother. They had separate shops. By an arrangement between the brothers, William was to pay one-half the expense of feeding the horse belonging to Charles, and Charles, in consideration thereof, was to move, with the horse and wagon, material and apparatus of William, used in his business, from place to place, as required by William. From time to time, depending upon the jobs secured by William, and upon William's request, the horse and wagon and claimant's decedent were so employed. A job of painting had been completed by William at Lakeside. Charles had no interest in it; had not constructed or repaired the building, but upon request of William sent his father and the horse and wagon to Lakeside to draw into Detroit, to his brother's shop, the ladders, etc., belonging to William. It was while returning to Detroit with William's material and apparatus upon the wagon that claimant's decedent was killed, upon the tracks of an electric railroad, by a car.

The chairman of the arbitration committee said, in the course of the hearing:

"It doesn't matter whether he was hauling for a grocery store, as far as this case is concerned. If he was under this man's control and selected by him and paid by him, that is the particular point."

Two of the arbitrators awarded claimant six dollars a week for three hundred weeks. The third arbitrator refused to concur. Upon appeal, the Industrial Accident Board modified the action of the arbitrators and awarded $5.50 per week for a like period.

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OSTRANDER, J. (After stating the facts):

It is obvious that the policy of insurance, or of indemnity, is not an undertaking of the insurer to respond in all cases for injuries to, or death of, any employe of the assured, in any employment. The purpose plainly is to limit liability to cases of employment "in the operation of and in connection with the business herein stated." If there is any connection between the carpenter contracting business and the business of draying or hauling personal property for third persons, neither the property nor its owner being in any way connected with the business, it is not pointed out and I am unable to discover it. Whether the assured hauled the property of his brother for a consideration, (as he did), or gratuitously, his agent and employe engaged in the hauling was not employed by the assured in the operation of, or in connection with, the business stated in the policy.

Counsel for claimant makes an argument based in part upon the assumption, and assertion, that the statute, Act No. 10, Public Acts, Extra Session, 1912, does not contain the words "arising out of and in the course of his employment," but, unlike the statutes of many states, omits the words "arising out of," and includes only the words "in the course of his employment." This assumption is unwarranted. Part 2, section 1.

It is not contended that the contract of the insurance company is not controlling according to its terms. It is conceivable that a man may be engaged in more than one business, and as to one or more may elect to come under the terms of the act, and as to another or others elect not to be governed by the act. The declaration of the assured employer is not before us.

Upon this record, and considering only the points presented, it must be held that the order of the Industrial Accident Board, as affecting the respondent insurance company, is invalid. It is vacated.

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SUPREME COURT.

CHARLES E. BEAUDRY,
Applicant and Appellee,
vs.
WILLIAM H. WATKINS and BYRON D. RADCLIFFE,
Co-partners doing business as
WATKINS & RADCLIFFE,
Respondents and Appellants.

INTENTIONAL AND WILFUL MISCONDUCT.

Gordon Beaudry, 15 years of age, was employed as a delivery boy by respondents and was furnished a bicycle with which to do his work. While engaged in his work and riding on a busy street in the city of Detroit, he took hold of the rear end of a motor truck which was proceeding in the same direction. The truck turned suddenly to the right throwing the boy down on the pavement. He was run over and killed by another truck which was following close behind him.

HELD: 1. That the accident arose out of and in the course of his employment.

2. That his action in taking hold of the truck did not constitute intentional and wilful misconduct within the meaning of the law.

Certiorari to the Industrial Accident Board to review an award in favor of applicant. Affirmed.

Francis McGann, of Detroit, for applicant.
Ivin E. Kerr, of Detroit, for respondents.

MOORE, J. The facts are not complicated. On April 29th, 1914, and prior thereto, Gordon Beaudry, nearly fifteen years of age, was employed by Watkins & Radcliffe as a delivery boy and he was furnished a bicycle with which to do his work. On that date he was to make a delivery on Cass avenue.

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Permission was given him to get his luncheon at home, No. 997 Theodore street, and he was then to call for a package and return to the store.

One of his employers testified he "asked my permission to go home to lunch from Theodore street, or whatever the call back might be. I reluctantly gave him permission to make that trip that way on the ground that he would hurry up and come back. I think it was about twenty minutes to eleven when I gave him this order and he argued that he could go to Case avenue first, that he could go and make the pick up and get his lunch and get back early.

"Q. Making this pick up and making this delivery were in the course of his employment? A. Oh yes.

"Q. He was employed to do this very thing Mr. Watkins? A. He was."

The boy called at his home at about 11:30 o'clock and took ten minutes for lunch. He told his mother he had another delivery to make and was in a hurry. As he was proceeding in a westerly direction on Canfield Avenue East, he caught on the right rear end of a motor truck, proceeding in the same direction. This truck overtook and passed another truck also proceeding in a westerly direction. The boy was still hanging on the right rear end of the truck which turned suddenly to the right. As a result of the truck making this sudden turn the boy was thrown to the pavement a few feet in advance of the rear truck and before the driver in charge could stop, the left front wheel passed over the boy's body. Death resulted soon. Deceased at the time of his death was earning six dollars a week which he gave to his mother each week for use in the family. Deceased was an expert bicyclist.

We quote from the brief:

"It is the claim of respondent:

1. Gordon Beaudry, deceased did not receive a personal injury arising out of and in the course of his employment.

2. He was injured by reason of his intentional and wilful misconduct."

Sections 1 and 2, Part II of Act No. 10 of the Public Acts

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of the Special Session of 1912 are quoted. Under the first grouping it is argued, we again quote:

"After it is shown that the accident happened within the time during which he is employed, and at the place where he may reasonably be during that time, that is within the period and the scope of the employment, the workman must also know, that it was a risk incident to the employment; that it arose because of something he was doing in the course of his employment, or because he was exposed by reason of the peculiar nature of his employment to the particular hazard which caused the injury."

and that as the accident happened in the instant case because of decedent taking hold of the truck, there could be no liability.

Counsel cite many authorities which it is claimed support his contention.

Under the second heading it is argued:

"If the Court should hold that in order to constitute intentional and wilful misconduct, it should appear that the workman intended or expected to injure himself, it would be putting interpolating into the statute a limitation upon the clause which cannot be gathered from a plain and obvious meaning of the word."

The authorities cited are chiefly those of foreign jurisdictions. This court had occasion to consider the language used in sections 1 and 2 of Part II of the Act in *Clem* v. *Motor Co.*, 178 Mich. 340, and in *Rayner* vs. *Furniture Co.*, 180 Id. 168. A construction of section 2 was involved in *Gignac* vs. *Studebaker Corporation*, 22 D. L. N. 587. While the instant case is not on all fours with any one of those cases we think it must be said that the reasoning used in deciding them justified the ruling of the Industrial Accident Board.

The judgment is affirmed with costs.

Stone, C. J., Kuhn and Person, JJ. concurred with Moore, J.

OSTRANDER, J. In my opinion the risk assumed by the boy,

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though the cause of the injury was not a risk incident to his employment.

Steere and Brooke, JJ. concurred with Ostrander, J.

SUPREME COURT.

JAMES BRUCE,
Claimant and Appellee,
vs.
TAYLOR & MALISKEY,
and
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Respondents and Appellants.

DURATION OF DISABILITY—INJURY TO FOOT.

The claimant received an injury to his right leg below the knee by which he was disabled from working. Respondents paid compensation for 124 weeks and tendered payment for one additional week but demanded that claimant sign a settlement receipt closing the case. He refused and respondents petitioned the Board to be relieved from making further payments.

HELD: That under the facts, claimant is not limited to the amount of compensation specified for the loss of a foot, but is entitled to compensation during the time that his disability in fact continues, subject to the limitations in the statute.

Certiorari to the Industrial Accident Board to review an order denying respondents' petition to be relieved from making further payments. Affirmed.

Lee & Parker, of Flint, for Claimant.

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Shields & Silsbee, of Lansing, *Austin J. Spalding,* of Detroit, of counsel, for respondents.

Claimant was injured, his right ankle being broken. The defendant insurance company entered into an agreement with him to pay him compensation at the rate of $6.75 per week during the period of disability, the agreement being subject to the terms of the Compensation Act. Claimant was paid for 124 weeks, and pay for an additional week was tendered and a receipt in full demanded. Claimant refused to give a receipt and the company applied to the Industrial Accident Board to be relieved from making payments beyond the period of 125 weeks.

By the terms of the statute the period of disability for loss of a foot is deemed to be 125 weeks.

Claimant testified at the hearing in part as follows:

"I am not able to follow any work such as I had been following, that of a common laborer, and there is no work that I have been able to find at which I can earn a livelihood. My leg pains me all the time. I am able to stand on it by using my cane, and taking the weight off my foot, but when I put the leg on the ground, and try to stand on it, I suffer pain. I have recently noticed that there is a breaking out around the injured portion of the right ankle, which Dr. Tupper says is due to deficient circulation. * * * I am not ready at this time to take any treatment that might be recommended by a competent physician as a step toward improving my condition. I think it has gone so far that there is no use of it. I will let it alone, and see. I will take a treatment, but not an operation. That answer is given in view of the advice given me by my doctor, who said not to have any operation. After Dr. Tupper recommended me to the Murphy operation, I had a talk with Dr. McGregor, and he told me to let it alone and not have the operation. * * * The last time I did any work was at the time I received my injury, and I have not tried to do any work since. I have not made any effort to secure any employment that I am able to do without standing on my feet. * * * The reason that I have not done that is because I am not able to. * * * My hands and arms are both in good shape. My left leg is all right. My right leg is all right, down as far as the point where I was struck by the iron. There is a sore there (indicating a point on the leg) down to a point below my knee, my right leg is all

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right. My general health is good, and I have a good appetite, and except for my leg, I am a perfectly healthy man. * * * I have no education that enables me to take a clerical position, and when I sit down my leg pains me; the pain is with me all the time, and would interfere with me in any sitting down occupation."

Testimony of a physician was introduced which tended to prove that the condition of claimant can be, to an appreciable extent, remedied by a surgical operation. In part he said:

"In a case similar to Mr. Bruce's case, they get such results that the injured man, at the conclusion of this 12 months, is able to work, and stand on his feet, because they remove the very cause of the condition—that is, the removal of this bony tissue that is formed there, which impinges on the nerves, and that would have a tendency to cause pain. I believe in this case an operation over a year ago would have remedied the condition from which Mr. Bruce now suffers. Any operation would remedy it I think. I said so then, and I say so now. In my opinion, Mr. Bruce has not got now ten per cent of function in his foot. * * * Poor circulation caused the discolorations breaking out around the wound,—a general weakness due to the circulation, which you always find in a wound of that kind. He has recovered so far as nature is concerned. It has formed a splint. He has recovered as much as he ever will, and so far as the usefulness is concerned, he is practically disabled with that ankle and foot at the present time. He does not appear to have recovered but I contend that the man was totally disabled from work. He has not gotten over the injury, and I see no immediate prospect for his recovery unless he has the operation. That operation is not guesswork. There is a certain per cent. of chances against him. It is not 40 per cent., but it is not guesswork. Murphy has got this work down to a science. * * * * Following an operation on Mr. Bruce, after nature gets in her work of healing and cleaning up things,—after the operation, assuming that the operation is not a success, his condition will not be any worse than now. I don't see any reason why it should be. There is no great risk attending the operation. The risk of an operation is due to the anesthetic. They have got it down to an absolute science. There is not one fatality in 40,000."

To the writ of certiorari the Board returns as a part of its finding:

"The position and claim of said Bruce is set forth in his answer to said petition as follows: 'That the conditions are not the same as

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though the undersigned had lost a foot in which case he could have had recourse to an artificial limb and gone on with some employment. As it now stands he is entirely disabled and denies that the petitioner is entitled to the relief asked.' The Board found from the evidence and the inspection of the injured limb that this claim was sustained. While no parts of the body except the foot and ankle in question are affected, the condition is such as to prevent the use of an artificial limb or appliance and to disable Mr. Bruce from following his customary employment. Such condition so far has prevented him from following any employment. In the opinion of the Board the refusal of the defendant to submit to the proposed operation, referred to in the petition, was not so unreasonable as to justify the stopping of his compensation, the operation being a serious one and the result doubtful."

OSTRANDER, J. (After stating the facts):

If claimant is totally disabled, his compensation must continue to be paid, not for longer than 500 weeks. Plaintiffs in certiorari argue that it is anomalous that he should be permitted to recover for a period greater than the one fixed for the total loss of his foot, and it is suggested that the statute, section 10, be construed to mean for the loss of a foot, or what is equivalent thereto.

Section 9 and the applicable parts of section 10, of Part II, of Act No. 10, Public Acts, Extra Session, 1912, read:

"Sec. 9. While the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employe a weekly compensation equal to one-half his average weekly wages, but not more than ten dollars nor less than four dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks, nor shall the total amount of all compensation exceed four thousand dollars.

"Sec. 10. While the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employe a weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than ten dollars a week; and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of the injury. In cases included by the following schedule the disability in each such case shall be deemed to continue

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for the period specified, and the compensation so paid for such injury shall be as specified therein, to-wit:

* * * * *

"For the loss of a foot, fifty per centum of average weekly wages during one hundred and twenty-five weeks;"

The Board has found that claimant's incapacity for work is total. It would seem that the finding might well have been that his incapacity is partial only, thus limiting payments to 300 weeks, in view of claimant's admission that he had not tried to work since receiving his injury, nor sought any employment other than such as requires him to stand on his feet. However, I think there is some testimony tending to support the finding. We cannot by construction of the statute make a case of partial incapacity for work when the fact is found that the incapacity is total.

The conclusion of the Board will not be disturbed.

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SUPREME COURT.

JOSIAH V. BELL,
Claimant and Appellee,
vs.
HAYES-IONIA COMPANY,
and
MICHIGAN WORKMEN'S COMPENSATION MUTUAL INSURANCE COMPANY,
Respondents and Appellants.

HERNIA—HELD PERSONAL INJURY BY ACCIDENT.

Claimant suffered a hernia from exertion in trying to raise a window in the factory where he was employed. The evidence and facts are reviewed in the opinion in detail, the Court holding that the hernia so received constituted a personal injury by accident within the meaning of the Workmen's Compensation Law.

Certiorari to the Industrial Accident Board to review an award in favor of claimant on account of a hernia. Affirmed.

R. A. Colwell, of Ionia, for claimant.
Beaumont, Smith & Harris, of Detroit, for respondents.

KUHN, J. The claimant has been awarded compensation under Act 10, P. A., 1912. The award was made in the first instance by a committee of arbitration, and was approved by the Industrial Accident Board, and that decision is brought to this court by certiorari, for a review of the findings.

The substance of the testimony which bears on the alleged accident is that the claimant was employed by the respondent in work on automobile bodies which required frequent lifting of them; that on May 29, 1914, the window of the room where he was working had been put down during a storm, and had swollen enough to make it stick; after the storm had ceased, Bell put it up again, and it required considerable exertion. He testified that after lifting the window he "felt

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something come down that felt quite painful;" that "when I felt the pain after lifting the window, I went to the toilet and found a lump there. * * * The lump was about like an egg. It was on my right groin. I never noticed the lump before."

This happened at 4 o'clock. He continued to work, lifting bodies, until 5:30 o'clock, closing time. On his way home he felt faint, and complained to his wife of an inclination to vomit. When asked whether he noticed any condition that made him think he had hernia, he said:

"It came down Friday night. I got it back Saturday, and Sunday it stayed in place. On Monday when I went to work, it came out again."

He did not work Saturday and Sunday, but returned to his usual work on Monday, and suffered pain all day. When he reached home that night, the doctor was called, and after some effort reduced the hernia. An operation proved necessary, and was performed, and the claimant was disabled for 10 weeks. Compensation was awarded him for that period at $6.92 per week, in addition to medical and hospital expenses for 3 weeks, the period of his confinement.

Among the several points relied upon by respondents for a disallowance of the claim, the one most extensively discussed is that the injury did not result from an accident. The argument goes upon the theory that a hernia is the result, "not of a single fortuitous event, but either of the anatomical defect of the claimant or of the long continued lifting for a number of months;" that hernia is the result of a very gradual process; that it is not an accident, but a disease. Medical authorities are quoted from, and the testimony of expert witnesses presented, to substantiate the theory. But whether this theory is correct or not, the argument is disposed of by the decision in the recent case of *Robbins* v. *Original Gas Engine Co.*, 23 D. L. N. 142. There is evidence that the claimant felt a pain in the groin after raising the window, and

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discovered a hernial protuberance immediately afterward. He continued to work, and "both lifting the window and lifting the body caused this pain. I was pulling up the window when the pain came on, and also when I lifted the body." The work on Monday, after he had "got the hernia back," caused more pain, and brought it down again, so that the physician had difficulty reducing it. It is clear that the committee and the Board were justified in finding that the hernia was pushed through and made so acute by the lifting of the window as to disable the claimant. See *La Veck* v. *Parke, Davis & Co.*, 23 D. L. N. 13. Such an injury entitled the claimant to compensation. See *Skinner* v. *Commercial Travelers' Mutual Accident Association*, 23 D. L. N. 121; *Robbins* v. *Original Gas Engine Co.*, supra.

The respondents offered in evidence the report of Dr. Knapp, who attended the claimant, in which it was stated:

"Patient says for 2 or 3 weeks been having pain in groin, and that while closing a window at factory felt strain which in 2 or 3 days resulted in strangulated hernia."

It was presented in connection with the following testimony of Dr. Knapp:

"I would call it a perfectly fresh puncture. It was evidence to me that the hernia was caused as claimed. Indications are to the effect that the act of putting up the window and lifting the body from the work bench caused the bowel to go through and form a sac. * * *

"I believe, as near as I can tell, he had no rupture before, and he had it afterwards. The preponderance of evidence seems to show that it came on at that time as the result of his work.

"Mr. Smith: Dr. Knapp, did he say anything to you about having had a pain in his side previous to this?

"Dr. Knapp: Afterwards I asked him how long he had had it, and he said he did not know anything about it; on Saturday he lifted the window and the body, and felt it come on him then.

"Mr. Smith: You reported to the Insurance Company, 'Patient says for two or three weeks been having pain in groin.' Is that so, Mr. Bell?

"Mr. Bell: I don't remember saying that.

"Mr. Smith: The report was made June 9th; where do you suppose the doctor got that idea?

"Mr. Bell: I might have told him that. I have tried to be honorable

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and truthful, and always have. I don't remember saying that, although I might have said it at that time.

"Mr. Smith: How do you account for this report?

"Dr. Knapp: He must have told me that he had had previous pain there, or I would not have made such report. It might be that this condition arose before if that is the same pain, or it might have been a pain in the abdomen lower down."

The Board rejected the report.

This evidence might properly have been received, since it contradicted a part of Dr. Knapp's testimony. But the error is not of sufficient importance to invalidate the findings. The presence of a structural weakness or actual pain, antedating the injury alleged, in the region where the injury occurred, does not preclude a recovery if the injury itself is distinct, and the result of a particular strain causing a sudden protrusion of the intestine. As in *Robbins* v. *Original Gas Engine Co.,* supra, there was testimony to support a finding that the claimant made a distinct and unusual exertion, that he immediately felt unusual pain, and presently discovered a protrusion through the abdominal wall about the size of an egg. And it may be appropriately said here also, that

"it is assumed that it was the first time the sac had been forced through the abdominal wall. If it is also assumed that there was a certain lack of physical integrity in the parts where the injury was manifested, still I think claimant may have compensation for the injury he suffered." *Robbins* v. *Original Gas Engine Co.*, 23 D. L. N., p. 144.

See also *La Veck* v. *Parke, Davis & Co.,* supra, and recent decisions of the Massachusetts court, *Re Madden,* 111 N. E. 379, and *Crowley* v. *City of Lowell,* id. 786, for an application of the same principle. The rejected evidence could be given its due weight and accorded belief, without requiring a finding of no accidental injury on May 29 resulting from the opening of the window.

Complaint is made of the action of the Board in excluding the extracts from medical textbooks, offered by the respondents as evidence of the true nature of hernia. As the only

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object of offering such evidence could have been to prove that hernia is not an accidental injury, in view of what has been said on this subject it is unnecessary to discuss this question.

It is contended that the finding of the Board that there was an accident is not conclusive on this court, under a correct construction of the provision that the "findings of fact made by the Industrial Accident Board *acting within its power* shall, in the absence of fraud, be conclusive." Fraud is not averred or shown. But respondents' counsel, treating this as a finding of fact, contend that the Board acts within its power only when it deals with an accident to an employee arising out of the employment, and that since such facts (viz., that the injury was an accident, the injured person an employee, and the accident one arising out of the employ-ployment) are jurisdictional, the Board's finding of them is not conclusive on this court. "Unless it has before it an accidental injury arising out of and in the course of the employment, it is beyond its power and authority." If counsel mean that the Board's findings of fact are conclusive only when the Board is dealing with an accidental injury arising in the course of the employment, it is equivalent to saying that such findings of fact are conclusive only when made after the facts justifying an award have already been established. From this point of view, it is difficult to see what facts are to be found, or what the purpose of the findings could be. Manifestly, something else was intended by the words, "acting within its power."

Undoubtedly the Board has no jurisdiction to *make an award* until it has decided upon the facts found by it that the injured person was an employee, that the injury was the result of an accident, and that the accident arose in the course of the employment; and counsel doubtless means to assert only that the conclusions of the Board on these points are not binding on this court. Perhaps it is sufficient to say that since we agree with the conclusion of the Board on these points, any discussion of the question is unnecessary.

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However, an apparent confusion in the recent decisions deserves some attention.

While the Board's findings of fact are undoubtedly conclusive on this court (see *Rayner* v. *Sligh Furniture Co.*, 180 Mich. 168; *Lindsteadt* v. *Sands Salt & Lumber Co.*, 23 D. L. N. 45), it is clear that the legal conclusions of the Industrial Accident Board, when based upon findings of fact, are subject to the supervision of this court. See recent cases: *Bischoff* v. *American Car & Foundry Co.*, 23 D. L. N. 132; *Robbins* v. *Original Gas Engine Co.*, id. 142. If it is clear upon the facts found by the Board that as a legal conclusion an injury was not accidental, or that it did not arise in the course of the employment, a contrary conclusion awarding compensation will not be allowed to stand. The Act does not make the Board's legal conclusions binding on this court. It was said in *La Veck* v. *Parke, Davis & Co.*, 23 D. L. N. 13, that "where there is testimony upon which the accident board can base its conclusion we will not review its action," and cases were cited to support this rule. But we were referring then to a conclusion of fact. In *Redfield* v. *Compensation Insurance Co.*, 183 Mich. 633, the findings of the Board which were treated as final when supported by any evidence were matters purely of fact. In *Bayne* v. *Riverside Storage & Cartage Co.*, 181 Mich. 378, the question whether the pneumonia which caused the death was caused by a particular straining was one purely of fact, and since the testimony was conflicting, it was a matter for the determination of the Accident Board. It was not intended to hold that whether that which caused the pneumonia was an accident, and whether the accident, if it was one, arose in the course of the employment, were purely questions of fact for the Board.

Since it has not been shown that the Board exceeded its power or acted fraudulently, we must conclude that the hernia was caused by the strain on the 29th of May, and the order allowing compensation is affirmed.

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SUPREME COURT.

MINNIE ROBERTS, Incompetent,
and GLADYS ROBERTS, Minor,
By W. HENDERSON, Guardian,
CLARA FACKLER,
Applicants and Appellees,

MURNA ROBERTS and ELLIS ROBERTS,
Minors, by CARL H. REYNOLDS, Guardian,
Applicants and Appellants,

vs.

WILLIAM H. WHALEY and GEORGE W. EDWARDS,
Co-partners, as WHALEY & EDWARDS,
and
UNITED STATES FIDELITY & GUARANTY
COMPANY,
Respondents and Appellants.

DEPENDENTS—ILLEGITIMATE CHILDREN HELD TO BE.

Decedent at the time of his injury and death was living in Grand Ledge, his family apparently consisting of a wife and two minor children. It later developed that his legal wife was insane and confined in the Pontiac State Hospital and an infant daughter by the insane wife was being cared for and supported by relatives. The woman with whom he was living at the time of his death was not his wife and the two children by her were illegitimate.

HELD: That the illegitimate children were entitled to the compensation being members of his family and dependent upon him at the time of his decease.

Certiorari to the Industrial Accident Board to review the order granting compensation to the wife and daughter. Reversed and award made in favor of illegitimate children.

F. H. Dusenberry, of Mt. Pleasant, for applicants and appellees.

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Cummins, Nichols & Rhoads, of Lansing, for applicants and appellants.

Clark, Lockwood, Bryant & Klein, of Detroit, for respondents.

BIRD, J. N. H. Roberts was killed while working in a sewer in Grand Ledge. Application for an allowance was made to the Industrial Accident Board on behalf of his insane wife and daughter, and also on behalf of his two illegitimate children and his housekeeper. Upon a stipulation of facts, an award was made and divided between the wife and daughter. We are asked to review the proceedings on behalf of the illegitimate children, and the defendant insurance company.

The record discloses that Roberts was married to Minnie Fox in the year 1903. In the following year, 1904, the daughter Gladys was born. Two years later, in 1906, the wife became insane and was taken to the asylum. After the mother was taken away, Gladys went to live with a Mr. Henderson, where she has since resided and been cared for by him in his family. Roberts being left alone, employed a housekeeper. He appears to have become enamored of her, and later lived with her openly as a wife, and two children were born to them, Murna and Ellis, the appellants. At the time Roberts was killed, he was living with and supporting these children and their mother. The wife, Minnie, was still in the asylum at the time of his death, and had been supported there at the expense of the State, and Gladys had been supported by Henderson, and it appears that Roberts had contributed nothing to the support of either during their absence.

The position taken by the defendant insurance company is that no award should have been made, because neither the wife nor Gladys was living with, nor was either dependent on Roberts at the time of his death, and further, that the law will not encourage the immoral relation of the parents by recognizing their illegitimate children. On behalf

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of the illegitimate children, it is urged that they are the children of the deceased, and that they actually lived with him, and as a matter of fact, were wholly dependent upon him, and are, therefore, by reason of such dependency, entitled to the award.

(1) Is the wife entitled to share in the award?

It appears without dispute that the wife was not living with her husband at the time of his death, and had not lived with him for nine years prior thereto. Therefore, it is obvious that if she is entitled to the award, it must be by reason of her dependency on him. That question is one of fact. The stipulation of facts shows that she has been supported by the State for upwards of 9 years, and that the deceased has contributed nothing. I am unable to see how upon this record it can be said that she was dependent upon her husband for support at the time of his death. The record simply shows that she was not. For cases supporting this view, see:

New Monckton Collieries Ltd. vs. *Keeling,* 4 B. W. C. C. 332.
Lee vs. *"Bessie,"* 1 K. B. 85; 81 L. J. K. B. 114; 105 L. T. 659, 5 B. W. C. C. 55.
Polled vs. *Great Northern Ry. Co.,* 5 B. W. C. C. 620.
Devlin vs. *Delaw Main Collieries,* 5 B. W. C. C. 349.
Niddrie & Benhar Coal Co., Ltd. vs. *Young,* 5 B. W. C. C. 552.
In Re *Nelson* (*Mass.*), 105 N. E. 357.
In Re. *Bentley* (*Mass.*), 104 N. E. 342.
Batista vs. *West Jersey & Seashore R. R. Co.,* (New Jersey), 99 Atl. 954.
In Re. *Jones, Ohio-Ind. Com.* 6 N. C. C. A. 250.
Finn vs. *Ry. Co.,* 22 D. L. N. 1201.

Counsel's argument in effect amounts to this, that a presumption of dependency arises from the fact of marriage, and the consequent duty of her husband to support her.

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Where the issue of dependency is one of fact, proof that claimant is the wife of the deceased is of course, admissible, and in connection with other facts, may be of help in determining that issue. Or, if the issue is whether the wife is conclusively presumed to be dependent, proof of the fact of marriage standing alone, might raise a presumption that she was living with the deceased at the time of his death, because wives usually live with their husbands. But where proof of marriage is followed by a concession that she had not lived with the deceased for nine years prior to his death, that she had been supported by the State, and that her husband had contributed nothing toward her support during that period, the value of such proof, either on the question of dependency, or in aid of the presumption, has very little force. The fact that claimant did not voluntarily separate from her husband, is urged as a reason why she should be regarded as constructively living with him during her absence. Were this proceeding one to recover for necessaries furnished her by another, or a divorce proceeding, in which permanent alimony was to be awarded to her, this consideration would be important. This proceeding, however, is based upon a statute which provides a fund, not for the benefit of the workingman's estate, not for the benefit of his creditors, not for those equitably entitled to be supported by him, but the fund is provided for the benefit of those dependent on his labor at the time of his death.

The act provides:

> "If death results from the injury, the employer shall pay, or cause to be paid, subject, however, to the provisions of Section 12 hereof, in one of the methods hereinafter provided, *to the dependents of the employe.*" (Laws 1912, Act 10, Part 2 Sec. 5).

Unless the claimant is actually dependent upon the employe at the time of his death, she does not come within the class designated by the statute, however unjust or inequitable it may appear. What may have led to the separation is of little importance, if it results in the claimant ceasing to be

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a dependent upon the employe. For instance where claimants were being cared for in the Work House, Reformatory and Asylum, see:

Rees vs. *Penrikyber Nav. Colliery Co.*, 1 K. B. 259, 72 L. J. K. B. 85, 87 L. T. 661, 19 L. S. R. 113.
Trainer vs. *Robert Addis & Sons Collieries, Ltd.*, 42 So. L. R. 85, 7 F. 115, 12 S. C. L. S. 460.
Berlin vs. *Chesky, Wis. Ind. Com.* Dec. 22, 1913.

In putting this construction on the act, we do not mean to hold that a wife who is temporarily absent for travel, business, pleasure or health, as indicated by Mr. Justice Steere, in *Finn* v. *Ry. Supra,* would be excluded from the benefits of the act, if she has not ceased to be dependent. Our conclusion on this record is that the wife was not a dependent within the meaning of the act, and therefore, is not entitled to participate in the award.

(2) Is Gladys entitled to share in the fund?

What has been said with reference to her mother, in the main, applies to Gladys. No presumption of dependency in her behalf, can be indulged. In order to indulge the presumption of dependency in her behalf, it must appear that she was living with the deceased at the time of his death, and that there was no surviving parent. Neither one of these conditions was present, and therefore, she is not within the class presumptively entitled to the fund. If she is entitled to participate in the fund, it must be by reason of her having been dependent upon her father at the time of his death. The record conclusively shows that she was not dependent upon him at that time, therefore, she is not entitled to participate in the award.

(3) Are the illegitimate children entitled to share in the award?

It appears to be conceded upon the record that Murna and Ellis are the children of the deceased. It further appears that they lived with him and were members of his family,

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and that they were dependent upon him at the time of his decease. They were actually cared for and supported by the deceased, and they had a right to expect a continuation of the support and care had he lived. This brings them clearly within the statute, and establishes as a matter of fact, that they were dependent, and therefore, entitled to the fund. But it is said they are illegitimate children, and that the law will not encourage the immoral and unlawful relation of the parents by recognizing them. The children are in no wise responsible for their existence or status. They are here, and must be cared for and supported. They were cared for and supported by the deceased up to the time of his death. It was his legal and moral duty to support them, and he was responding to that duty when death overtook him. We think they are clearly within the class entitled to the fund, and it must be passed to them. The award made by the Industrial Accident Board must be set aside, and the fund awarded to them.

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SUPREME COURT.

FRANCIS SCHREWE,
Claimant,
vs.
NEW YORK CENTRAL RAILROAD COMPANY,
Defendant.

SUPREME COURT—WHEN APPEAL WILL NOT LIE.

Writ of certiorari to review the award of a committee of arbitration is dismissed on motion, the court holding that a party feeling aggrieved by such award must first take the matter before the full Board for review as provided by statute; and that it may be taken to the Supreme Court on questions of law only after such hearing on review.

OSTRANDER, J. Part III of Act No. 10, Public Acts (Extra Session 1912), is entitled Procedure. If an injured employe and his employer or the indemnitor of the employer agree concerning the compensation to be paid the employe under the act, their agreement, reduced to writing, may be filed with the industrial accident board and, if approved, is final and binding. If an agreement is not reached, the precedure is, first, the formation of a committee of arbitration, one member of which shall be a member of the industrial accident board. The committee, having made an investigation and award, files its decision with the industrial accident board, and,

"Unless a claim for a review is filed by either party within seven days, the decision shall stand as the decision of the industrial accident board."

If a claim for review is filed, the board shall promptly review the decision of the committee "and such records as may have been kept of its hearings," hear such additional evidence as the parties wish to submit,

"and file its decision therein with the records of such proceedings."

"The findings of fact made by said industrial accident board act-

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ing within its powers, shall, in the absence of fraud, be conclusive, but the supreme court shall have power to review questions of law involved in any final decision or determination of said industrial accident board."

Either party may present to the circuit court of the county in which the accident occurred the approved agreement settling the compensation to be paid, the unappealed from award of the committee or the decision of the industrial accident board upon review, and the court is empowered to enter judgment in accordance therewith without notice.

It appears that, although the writ of certiorari issued in this proceeding is addressed to the industrial accident board, the board has not, in fact, been asked to review the award of the committee. The question presented is whether this court should review, in certiorari proceedings, the unappealed from award of a committee of arbitration or whether a party claiming to be aggrieved by the action of the committee should first seek a review of the committee action by the industrial accident board.

The proceeding is a special and peculiar one. It may or may not be an adversary proceeding with respect both to the facts and the law. To the industrial accident board is confided, finally, the determination of the facts according to which an award of compensation is made, or is refused. There is involved, in every case, the application of the statute to the determined facts. The *decision,* whether of the committee or of the board, involves such an application of the statute. It is the *decision* of the committee which upon seasonable application may be reviewed by the board and, upon such review, corrected, if correction is required. It is questions of law involved in any final decision or determination of the board which may be determined by the court. It is plain, I think, that the act secures to parties claiming to be aggrieved by the decision of a commitee, first, an appeal, second, a review of questions of law involved in the decision on ap-

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peal. In any event, such a construction of the law is warranted by the terms of the law and, being warranted, should be adopted because it makes, first, for uniformity and simplicity of procedure, and second, it prevents setting aside and amending by the court decisions which have, in fact, never received the attention of the body charged with the execution of the law; a body which it is presumed will, upon review, correct the decision complained about.

In my opinion, the motion to dismiss the writ of certiorari should be granted, with costs.

BY THE BOARD.

FRANK KILGREN,
Applicant,
vs.
E. H. STAFFORD MANUFACTURING COMPANY,
and
MICHIGAN WORKMEN'S COMPENSATION MUTUAL INSURANCE COMPANY,
Respondents.

AVERAGE WEEKLY WAGE.

Applicant had been in the employ of respondent company for a number of years as a molder at a wage of more than $20 a week. In the summer of 1915 he left the company and entered the employ of the traction company at Lansing as a conductor where he worked for about two months at a daily wage of $2.07. He returned to the company and asked for and was promised his old job. The molding floor was being repaired and he was put to work in the veneer room at work commanding a wage of 20c an hour, and while at this work he was injured.

HELD: That his compensation should be based upon the wage for the veneer room work in which he was engaged at the time of the injury.

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The applicant, in the summer of 1915, was in the employ of respondent as a molder at a wage of twenty ($20.00) dollars per week and upwards, having been in such employ for about three years. He left this employment and came to Lansing and worked for the Traction Company as a conductor for about two months at an average daily wage of two dollars ($2.07) and seven cents. Before going to Lansing he talked with the Superintendent about keeping his job open, so that he might come back if he did not like the work on the railroad, and was assured by the Superintendent that he would get the job back if he wanted to return. In the early part of October he came back to respondent's foundry at Ionia, saw the Superintendent, and asked if he could have his old job back. The Superintendent told him he would see the foreman, which he did, and then told applicant, "You will get your job back again," and that he could come to work Monday. Applicant came on Monday to go to work, but was informed that certain changes were being made on the molding floor and that they could not put him to work as a molder for a day or two, and that he should go to work in the veneer room until such time as the foundry floor was in shape for use. He worked about a day and a quarter in the veneer room when he met with an accident resulting in the loss of the four fingers of his right hand, which were cut off by a saw. The principal question in the case is the rate of wages. The wage in the molding room was in access of twenty ($20.00) dollars per week, while the wage in the veneer room was twenty (20c) cents an hour, it being claimed that at the time he was put to work his wages were fixed at twenty (20c) cents per hour by the timekeeper.

We think that at the time applicant went to Lansing to work as a conductor he terminated the relation of employer and employe between himself and respondent. The talk of holding the job open for him, if he should want to come back, did not amount to a contract continuing that relation, but was more in the nature of a friendly assurance of re-employ-

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ment if he should desire to return. Upon his return, the Superintendent proceeded to make arrangements to give him back his old job as molder, intending that he should commence work as such on Monday, October 11, 1915. Conditions in the foundry were such that he could not commence on that day, as the floor would not be ready for use for a day or two. Under those circumstances, it would be natural to postpone the commencement of work until the floor was ready, or to find or suggest some other work to do in the interim. The latter course was followed, and applicant was put to work in the veneer room at a class of work commanding a much lower wage. It is claimed that the wage was fixed in the presence and hearing of applicant, but this he denies having heard.

The true status of the parties at the time of the accident seems to be that applicant was put to work temporarily in the veneer room, the understanding of the parties being that he would be transferred to the molding room as soon as the floor was in readiness for use. The employment in which he was engaged at the time of the injury was the work of the veneer room, that being the beginning of a new employment by respondent.

Though it was contemplated that he would later be employed as a molder, that point was never reached on account of the occurrence of the accident, which he claims disables him from doing molding work. The fact that the company intended to give him the work in the molding room and that he expected to be given such work, we think does not change the situation. His actual employment, and we may say his only employment, was that in the veneer room where the wage was twenty cents per hour. Even if he did not hear the conversation purporting to fix his wage in the veneer room, from his experience in the shop and plant of the company, he presumably had a fair knowledge of the rate of wages paid for that class of work. If the wages were not fixed by agreement, then he would be entitled to the going wage for the

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class of work that he was doing. He was at liberty to accept this employment in the veneer room, or to wait until conditions were such that he could go to work in the molding room. The case is different from what it would be if he had been previously working as a molder and was temporarily transferred to the veneer room. His going to work as a conductor completely severed his relation with the company and he came back a new employe. The only work that he did after his return was the veneer room work, in which he received his injury.

We think that the award on arbitration should be affirmed.

Petition for writ of certiorari denied in this case July 21, 1916.

HENRY ROBINSON,
Applicant,
vs.
WAYNE COUNTY MOVING & STORAGE COMPANY
and
MICHIGAN WORKMEN'S COMPENSATION MUTUAL INSURANCE COMPANY,
Respondents.

ARISING OUT OF.

Applicant was a teamster in the employ of the moving and storage company but working on the streets of the City of Detroit hauling sweepings which were gathered in piles along the street. As a part of his work he was required to move teams when necessary to get at and load the sweepings. His action in moving a certain team was resented by its driver, who struck and injured applicant with a pick-hammer.

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HELD: 1. That the injury arose out of the employment and flowed from a danger reasonably incident to it.

2. That under the facts in the case applicant was an employe within the employ of the moving and storage company notwithstanding the fact that he did his work on the streets under the direction of the ward boss.

Applicant had been in the employ of the moving and storage company as a teamster doing general teaming work connected with the moving and storage of goods and such other teaming as he was from time to time directed to do. At the time of the injury, he was working with his team on a certain street in the city of Detroit, hauling away "sweepings" under the direction of the ward boss. The nature of the work and the order under which Robinson was acting required him to move teams standing in the street in order to get all of the piles of dirt or sweepings as they went along. Shortly before he was injured, he moved a team which was standing in the street, against the protest of its driver, who became angry and used abusive language. He then proceeded to pick up the dirt and while so engaged the driver of the team which he had moved came up behind and struck him over the head with a pick-hammer inflicting the injuries complained of.

It seems clear from the evidence that applicant was an employe of the moving and storage company within the meaning of the Workmen's Compensation Law. The company was his general employer and directed him where to work and could call him off from the city job at any time. Each day after his work for the city was finished he was required to take his team to the office of the company for further directions, and frequently required to haul loads and do jobs for the company after finishing his day's work on the streets. The fact that he was hauling sweepings for the city and while so doing was under the direction of the ward boss does not change the character of the employment. It was essentially the same as if he was hauling garbage or material for any other person having work of that character to do. The busi-

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ness of the company was handling and hauling material for others, such work being done generally in accordance with the wishes of the persons owning the material and under such orders and directions as they desired to give. This case differs from Kennelly v. Stearns Salt & Lumber Company, as in that case the relation of employer and employe was temporarily and completely severed by the command of the State Fire Warden. Kennelly was drafted into the service of the State by such order and entirely taken out of his regular employment. In the Robinson case, the authority and control of his employer continued without interruption, while in the Kennelly case such authority and control was entirely extinguished and so remained until the man was discharged from further duty by the Fire Warden.

Did the injury arise out of and in the course of the employment? It is clear that it arose in the course of applicant's employment, it having occurred while he was engaged regularly in his work. The remaining question is whether it resulted from one of the dangers incident to such employment. His work involved the moving of teams where it was necessary in order to get at the sweepings, and this part of the work caused him to incur the possible danger of coming in conflict with the drivers of some of these teams and possible reprisals such as occurred in this case. We think it fairly appears that the risk of injury from irrate drivers of teams so moved in the work was one that arose out of his employment. The case In Re Reithel, 109 N. E. Rep. 951, decided by the Supreme Court of Massachusetts strongly sustains this view. In the Reithel case it was the duty of the deceased employe to order from his master's premises any person who entered without permission, and in discharging this duty he was shot and killed by one who resented his action in causing him to remove from the premises. In passing upon the question the Court say:

"An element inherent in the performance of the duty of excluding trespassers from property and mischief-makers from the company of

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employes, is that there may be some degree of violence encountered. The precise form which that risk may take is not of consequence. Its unexpectedness and gravity is not the test. * * That murder resulted instead of a broken bone is of slight, if, indeed, it is of any significance. This injury was one to which the employe was exposed by reason of his employment, and, but for the special duty imposed on him respecting Bombard, he would not have been in the way of receiving it. The causative danger was peculiar to his work. It was incidental to the character of the employment and not independent of the relation of master and servant. Although unforeseen and the consequence of what on this record appears to have been a crime of the highest magnitude, yet now, after the event, it appears to have had its origin in a hazard connected with the employment and to have flowed from that source as a rational consequence."

The award of the committee on arbitration will be reversed and compensation granted.

SUPREME COURT.

AUGUSTA KUNZE,
Applicant,
vs.
DETROIT SHADE TREE COMPANY,
Respondent.

EVIDENCE—REASONABLE INFERENCE—STREET TRAFFIC—ARISING OUT OF. Applicant's husband, Frederick Kunze, was in the employ of respondent as foreman, his duties requiring him to go from job to job about the city. Having completed his inspection on one job about nine o'clock in the morning of July 18, 1914, he left the work in charge of another employe and started to another part of the city, where it is claimed that he was to inspect another job for his employer. While so traveling he was struck and injured by an automobile and died on the following day.

HELD: 1. That the performance of his duties in supervising different jobs of work required him to travel from one to the other, using such means of locomotion as he might deem desirable;

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and that it is to be reasonably inferred from the evidence that when the injury occurred he was about to take a car to go to another locality to inspect work for his employer.

2. That where an employe in the course of his employment is compelled to travel about the streets as in this case, the danger of being struck by street cars, automobiles, or general traffic is properly held to arise out of the employment. (Hopkins vs. Michigan Sugar Company distinguished.)

Certiorari to Industrial Accident Board.

Proceedings by Augusta Kunze against the Detroit Shade Tree Company under the Workmen's Compensation Act for compensation for the death of her husband. Compensation was awarded by the Industrial Accident Board, and respondent brings certiorari. Affirmed.

E. D. Alexander, of Detroit, Attorney for applicant.
Thos. M. Cotter, of Detroit, Attorney for respondent.

KUHN, J. This case is brought here by cretiorari to review an award made by the State Industrial Accident Board.

Frederick Kunze, whose widow is the claimant herein, was employed by the Detroit Shade Tree Co., the defendant, as a tree trimmer and planter. Having been with the defendant company for about two years, on July 18, 1914 he was employed as a foreman; and in the course of this employment it was his duty to go from job to job about the city. On the day aforementioned he had inspected a job on Virginia Park, a street in the city of Detroit, and having completed this inspection at about 9 o'clock in the morning he left the work in charge of another employee and started east on Virginia Park to the intersection of Woodward Avenue, where it is to be reasonably inferred from the evidence that he was about to take a car to inspect another job north of Virginia Park at the corner of Josephine Avenue and Woodward Avenue; and it also appears that there was another job for inspection

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at the corner of Mount Vernon and John R. streets, which was also north of Virginia Park. While at the intersection of Virginia Park and Woodward Avenue he was knocked down by an automobile, seriously injured, and died the following day.

It is the contention of the appellant that there is no evidence in the record that the deceased was at the time of his death engaged in any business for his employer. Mr. Alfred Gibson, the president of the defendant company, was sworn and testified as to the character of the employment. It appears from his testimony that the deceased was employed by the week, and he stated that in the summer time "He went around trimming trees, doing tree surgery work, taking down trees, and so on, with other men in my employ that he had charge of." He also testified that at the time of his injury the deceased had on his person a list of places to go, one after the other, and stated that he had finished his work on Virginia Park.

We think it is clear from the record that the employment of the deceased was to go from place to place to trim trees, and that in the discharge of those duties it was not only necessary for him to supervise the work but it was necessary, in the course of his employment, to proceed from one job to the other, adopting such means of locomotion as he might desire.

It is strongly urged by counsel for appellant that the death of the deceased was not due to any accident "arising out of and in course of his employment," and that there was no causal connection between the employment and the injury, and in support of this contention the recent decision of this court in *Hopkins* v. *Sugar Co.*, 184 Mich. 87, is relied upon. In the opinion in that case Mr. Justice Steere, speaking for the Court, quoted from the rule announced by the Massachusetts court, in which it was stated:

"If the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person

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familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workman would have been equally exposed, apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

Being clearly of the opinion that the record warrants the conclusion that at the time of the injury the deceased was within the ambit of his employment, we also think that it is a justifiable conclusion that the accident can be fairly traced to his employment as a contributing and proximate cause. It is true that in going from one place to another, as was his duty, he naturally was compelled to assume risks not in anywise connected with the trimming, planting, and treating of shade trees. But his employment extended further than this and necessarily obliged him in the discharge of his duties to go from place to place, and in so doing to assume the risks of traffic upon the streets. Where employes are compelled during the course of their employment to travel about the streets it does not seem to us to be unreasonable to say that the danger of being struck by street-cars, automobiles, and traffic of every description should be taken account of.

We think it must be said that the very nature of the occupation of the deceased itself exposed him to the unusual risk and danger of an accident of this nature, and believe that the instant case is readily distinguishable from *Hopkins* v. *Sugar Co.*, supra, where this court said that:

"No direct causal relation is claimed in the particular that the nature of the business of manufacturing sugar in itself exposes its employes to unusual risk or danger of accident of this nature."

It appears that in that case the deceased at the time of the accident had finished his duties of the day and had re-

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turned safely to his home city, Saginaw, and was injured because of slipping on the ice while passing on foot along a highway. In this case the deceased received his injury during the hours of employment while actively engaged in performing work for his master in accordance with duties imposed upon him by his employment. See Beaudry v. Watkins, 23 D. L. N. 378.

We are of the opinion that the order and award of the Industrial Accident Board should be and is hereby affirmed.

SUPREME COURT.

SARAH TUTTLE,
Applicant,
vs.
EMBURY-MARTIN LUMBER COMPANY,
and
LUMBERMEN'S MUTUAL CASUALTY COMPANY,
Respondents.

LOGGING—INDEPENDENT CONTRACTOR.

Applicant's husband, Ephriam Tuttle, was killed while hauling logs for respondent lumber company from the skidway to the mill. He was to be paid $2.00 per thousand for hauling the logs. The hauling was along a private road built and maintained by the lumber company, and his was one of a number of teams engaged in the work. The contract did not provide that he should haul any particular logs or any specific amount, and the manner of doing the work and the control was practically the same as the men and teams employed by the company in this work by the day or month.

HELD: 1. That deceased was not an independent contractor, but an employe of the company.

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Certiorari to the Industrial Accident Board.

Proceeding by Sarah Tuttle against the Embury-Martin Lumber Company under the Workmen's Compensation Act for compensation for the death of her husband. Compensation was awarded by the Industrial Accident Board, and respondents bring certiorari. Affirmed.

James F. Shepherd, of Cheboygan, Attorney for applicant.
Adams, Crews, Bobb & Wescott, Attorneys for respondents.

STONE, C. J. The question involved in this case is whether Ephriam Tuttle, the deceased husband of Sarah Tuttle, the applicant, was an independent contractor, or an employe within the provisions of the Workmen's Compensation Act. The Industrial Accident Board found that his relation was that of employe, and from that finding the respondents have brought the case here by certiorari.

Ephriam Tuttle, for whose death applicant claims compensation, was engaged in hauling logs for Embury-Martin Lumber Company, near Cheboygan, on January 8, 1915, and met his death by being thrown from a load of logs while he was driving the team drawing the load between the skidway, where the logs were loaded, and the mill, where they were to be delivered. Tuttle was working for the company under the following agreement, as testified to, on direct examination, by E. L. Slade, woods superintendent of the company:

"Mr. Tuttle came to the office in the afternoon—I can't tell you the date—it was in the neighborhood of ten days or two weeks before this accident occurred—and wanted to haul logs, and he wanted to know how we were hiring and I told him. I told him we had all the teams by the month that we could use, on account of our barn room—our barn was full and was hired ahead. He said he could stay at home and haul by the thousand, and I hired him to haul by the thousand, at two dollars a thousand, and we were to furnish the sleighs, and there was a certain pair of sleighs that the company had that he had hauled on the winter before, that had a short tongue, that he wished to use, and he came to town and brought those sleighs back

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with him. He used those sleighs one day, on the Monday before * * * Later in the week Mr. Tuttle called me up by phone. He fixed our telephone line—the wind blew it down, blew a tree across it or something. Anyway, he fixed the line up voluntarily; he done it of his own accord, but he received his pay for it from the office; I guess he got some tobacco and things that the clerk gave him for his services. I guess he was coming over to the office on purpose to see about hauling."

Q. "What was the conversation over the telephone?"

A. "He wanted to know if he could start hauling again, and I told him yes, to start on in the morning."

Q. "When was that?"

A. "That was the evening of the 7th."

Q. "Was that all that was said over the phone?"

A. "That is all I remember being said. It was a very short conversation."

Q. "Now, when hauling was done for you by the thousand feet, was it done on any particular days?"

A. "No, it was any day they are a mind to come after a load."

Q. "Or with any regularity at all?"

A. "No, they were loaded in turn as they came."

Q. "Were there any specifications made on a man's haul on any particular day?"

A. "No sir."

Q. "Did you determine—did the Embury-Martin Lumber Company or anybody in its behalf determine the size of his loads?"

A. "No sir."

Q. "Who did?"

A. "He did himself."

Q. "Does the Embury-Martin Lumber Company determine the size of the loads hauled by your employes?"

A. "It is simply up to the foreman and condition of his roads."

Q. "Do you give—does the Embury-Martin Lumber Company or any of its employes give persons who are hauling by the thousand feet any directions as to how they shall haul—as to the manner of their hauling—as to how rapidly they shall haul, or anything at all?"

A. "One trip a day. We haul from that job one trip a day."

Q. "You mean that is all you can haul?"

A. "That is all you can haul—one trip a day."

Q. "But you don't have any requirements by which they haul one trip a day?"

A. "No sir."

Q. "Or any particular number of trips?"

A. "No sir."

Q. "You simply tell them to haul from the skidway?"

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A. "To the mill."
Q. "To the mill?"
A. "Yes sir."
Q. "These people who haul by the thousand feet handle the logs at that end to where they are hauling, did they?"
A. "Yes sir."
Q. "They come and go where they please and haul such loads as they please?"
A. "Yes sir."
Q. "When are they paid?"
A. "They are paid whenever they call for their money at the office."
Q. "At any time?"
A. "The load is scaled there and they are given a slip or scale sheet and they can get their money then or let it stand for a week. They can have it any night after it is scaled."
Q. "That is the practice is it?"
A. "That is the practice."

Upon cross-examination the following testimony was given by this witness:

Q. "Did you employ Mr. Tuttle to haul any particular number of thousand feet?"
A. "No sir."
Q. "Did you hire him to haul any designated lot of logs, I mean, outside of the general mass that you had out there?"
A. "No sir."
Q. "He didn't agree that he would haul one hundred thousand or fifty thousand, or any particular quantity?"
A. "No sir; we didn't let any jobs of any kind in that way."
Q. "Whose employes load the sleighs?"
A. "Embury-Martin Lumber Company's."
Q. "What would he, Mr. Tuttle, be doing—I am taking him as one hauling by the thousand—what would he be doing as the logs were loading?"
A. "We load the sleighs with a jammer and they use the team on the cable at the jammer."
MR. KENNEDY: "Whose team do you use?"
A. "The team we are loading—whosever team is on the sleigh."
Q. "Did you use Mr. Tuttle's when he was there?"
A. "Yes sir."
MR. SHEPHERD: "So that Mr. Tuttle would be busy while the sleigh was loading, then?"
A. "Yes, his team would be busy, and he would be busy, yes. The team they place on the sleighs—their own, yes."
Q. "He would be handling the team?"

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A. "Yes sir."

Q. "Who fastens the chains around the logs and sees that they are secure on the load?"

A. "The laborers."

Q. "Embury-Martin Lumber Company's employes?"

A. "Yes sir."

Q. "Mr. Liddy, for instance?"

A. "Yes sir, there is three men in the gang."

Q. "How many men usually ride on a load down town—I mean in the course of business—I dont mean anybody that might catch on?"

A. "One man, the driver."

Q. "Is there any difference in that regard as between men who are paid by the thousand and the men who work by the day?"

A. "In regard to how many ride?"

Q. "Yes."

A. "Why no. That is his own option."

Q. "You said the man handled the haul himself after the load was on the sleighs?"

A. "Yes sir, after he left the skidway—after he got on his load, why that was his load to go with—he handled that to the mill.

Q. "That was so of those who hauled by the thousand as well as those that worked by the day?"

A. "Yes sir."

Q. "So far as that was concerned there wasn't any difference between the two classes of men?"

A. "Not in regard to handling the load."

* * * * *

Q. "Let me ask this: Was this haul on which he was found dead on one of the Embury-Martin logging roads? Was that a road that was built by them?"

A. "Yes."

Q. "For the purpose of hauling their logs from camp to the mill?"

A. "Yes."

Q. "At Cheboygan?"

A. "Yes sir."

Q. "It was not a public highway?"

A. "No sir."

Q. "Was there any other place for men to haul logs from your camps, except the mill at Cheboygan?"

A. "No sir."

Q. "And you didn't haul logs from any other spot to the mill, except from those camps?"

A. "No sir."

The man who loaded the sleighs, and was called the "top loader," testified, among other things, as follows:

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Q. "Did you put any logs on the sleighs of Mr. Tuttle?"

A. "I did."

Q. "When was that?"

A. "The 8th of January—the morning of the 8th."

Q. "Do you know how many logs—how many loads of logs he hauled that day?"

A. "That was his first trip that he made to our gang."

Q. "Who directed him where to get the logs?"

A. "I couldn't tell you. I presume the foreman did though, it would be his place to."

Q. "Was the team brought up to the loads, or did you roll the logs to the team?"

A. "Well, the sleighs were set there, and what didn't roll we dragged up."

Q. "The logs were in a certain place?"

A. "They were on a skidway, yes sir."

Q. "Whose logs were they?"

A. "Embury-Martin Company's."

Q. "Do you know who they were put on the skidway by?"

A. "I do not, they were skidded before I went there."

* * * * *

Q. "Mr. Tuttle told you when to stop loading, didn't he?"

A. "Sure."

Q. "That is, he said when he had enough logs?"

A. "Certainly."

Q. "There were some men working there by the month and others working hauling by the thousand, were there not?"

A. "Yes sir."

Q. "There were about twenty-one or twenty-two teams there at that time hauling by the thousand, weren't there?"

A. "I couldn't say for that."

Q. "There were quite a number?"

A. "Quite a number of teams?"

Q. "They wouldn't necessarily, with any regularity, would they, that is, some might come one day and then not come for a day or so, and then come another day?"

A. "Some that way, and some wouldn't."

Q. "That is some would come on off and on?"

A. "Yes, some of them would."

Q. "And those that hauled by the thousand would determine for themselves how many logs they would haul, would they not?"

A. "Yes, and also the whole of them tried—

Q. "Eh?"

A. "The most of them."

MR. KENNEDY: "That is you wouldn't load more on one team if—"

A. "If they didn't want to take it, I wouldn't try it."

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Q. "Well, it is true isn't it, that if some one who was hauling by the day came up with a sleigh, or someone who was employed by the month or by the day, he wouldn't be allowed to go off with just a small load would he, with a few logs on?"

A. "If I will be permitted I would like to explain, I can explain it better than you can ask the questions."

Q. "All right, go on."

A. "The morning he came there, being the first trip— the foreman told me to put on a certain number of logs—I asked him whether he was hauling by the thousand or by the day, and he told me he didn't know until he saw Mr. Slade; so I put on logs until I got the sleigh loaded."

MR. KENNEDY: "They all got their loads at the same place?"

A. "No, we had out other teams that morning, there was other teams to the other gangs."

Q. "The logs were all from the same land and from the same company?"

A. "Yes sir."

It further appeared that Mr. Tuttle did not live in the camp as did the other men, but lived at home. He fed and cared for his own horses. The load tipped over a short distance from the skidway, and deceased was crushed between two logs and died from his injuries on the same day.

The Embury-Martin Lumber Company had three classes of men hauling logs from their camp to the mill at Cheboygan. The first class used company teams and the men were paid by the month; the second class used their own teams, were boarded at the camp and were also paid by the month; the third class used their own teams and company sleighs, and were paid by the number of thousand feet of logs they hauled to Cheboygan.

As already appears, the work of hauling logs, at the time and place where Tuttle was employed, consisted of loading the logs upon the sleighs, which was done by a loading crew at the skidway under the direction of the foreman or top loader. The logs were placed on the sleighs by an apparatus called a "jammer," which consisted principally of a wire cable running through a block. A sleigh could only be loaded at a skidway where a jammer was set. The team on the sleigh

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to be loaded was hitched to one end of the cable and the other to the logs to be loaded. The team was then handled and driven by the driver, whether working by the month or by the thousand, under the direction of the foreman or top loader in charge of the loading crew. The logs were then fastened on the sleighs by the loading crews. The driver then drove to Cheboygan with the load of logs. No one accompanied the driver on the road to the mill. Where the injury occurred Mr. Tuttle was using a road built and maintained by the Embury-Martin Lumber Company. At the mill the driver placed the load of logs wherever directed by the company's foreman. The logs were unloaded by an unloading crew. The person hauling by the thousand did nothing with respect to unloading unless he so desired. Sometimes he assisted in unloading, but it was not required of him. The manner in which the work of transporting logs from the skidways at the camps to the mill was the same, whether the driver was paid by the month or by the thousand.

Neither Mr. Tuttle, nor those who hauled by the thousand, agreed to haul any particular kind, quantity or designated load of logs. They took logs from the same general mass which the others hauled from.

The vice-president of the company testified, among other things, that the foreman could prevent a man working by the thousand from taking a load if he so desired. Nothing was specifically said to Mr. Tuttle when he was employed about any custom among those who hauled by the thousand, nor was there any evidence that he knew of any custom.

The appellants contend that the conditions surrounding Tuttle's relation with the Embury-Martin Lumber Company contain eight elements which marked him as an independent contractor, and not an employe; and that in cases of this character the courts of this State, and of England, and the Industrial Boards and courts in the United States, have determined that a man in Tuttle's relationship, as defined by

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these eight elements, is an independent contractor. The eight elements are as follows:

(1) Furnishing own equipment—Tuttle used his own equipment, horses, etc.

(2) Compensation by amount of work done—Tuttle received $2.00 per thousand for the logs he hauled.

(3) Control of Working hours—Tuttle worked when he wished to and not otherwise. He could start work any time of the day.

(4) Control of the amount of work done—Tuttle could determine the size of the loads he hauled.

(5) Control of the manner of the work—Tuttle got his logs where he wished and was under no control while hauling.

(6) Freedom from supervision—Tuttle did not live in camp under the supervision of the foreman or other persons. He did not have to unload his logs as did the employes of the company.

(7) Control and care of equipment. Tuttle controlled and cared for his own team and equipment.

(8) Right to hire substitute or assistant. Tuttle could have sent a substitute or another man with another team if he had one.

It is urged by appellants that the distinction of the common law, between an employe and an independent contractor exists under the Workmen's Compensation Act and it has been so held in other jurisdictions, citing Massachusetts, California, Illinois and rulings of State Boards; also Curtis v. Plumtree, (Court of Appeals of England) 6 B. W. C. C., 87, and the following Michigan cases are also cited:

De Forest v. Wright, 2 Mich., 368;
Riedel v. Moran, Fitzsimmons Co., 103 Mich., 262;
Wright v. Big Rapids Door & Blind Mfg. Co., 124 Mich., 91;
Lenderink v. Village of Rockford, 135 Mich., 531;
Burns v. Michigan Paint Co., 152 Mich. 613;

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McBride v. Jerry Madden Shingle Co., 173 Mich., 248, and

numerous cases in foreign jurisdictions.

The appellee calls attention to Sec. 5, Part 1 of the Workmen's Compensation law of this State, which provides that the following shall constitute employers subject to the provisions of the act:

"Every person, firm and private corporation, including any public service corporation, who has any person in service under any contract of hire, express or implied, oral or written." * * * *

The appellee further contends that there is not only sufficient evidence in the record upon which the Accident Board could properly find claimant's husband was "in service under a contract of hire," but also that under the rules of law he was a servant as distinguished from an independent contractor; that the testimony of Mr. Slade, the woods superintendent, is to the effect that there was a contract of general employment. The following Michigan cases are cited by appellee:

Lewis v. Detroit, etc. Brick Co., 164 Mich., 489;
Ripley v. Priest, 169 Mich., 383;

and the following authorities are cited from other jurisdictions:

Knicely v. W. Va. Midland R. R. Co., 17 L. R. A. (N. S.) 370, and note;
State ex rel. Va. & Rainy Lake Co. v. District Court, 128 Minn., 43; 150 N. W. 211.

The opinion in the last cited case is quoted from at length.

Appellee's counsel urges that the eight elements set up by the appellants are not supported by the record, or are not controlling. We quote from appellee's brief:

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(1) "Furnished own equipment. Tuttle used his own team and company sleighs. Under Lewis v. Detroit Vitrified Brick Co., supra, and State ex rel. Virginia & Rainy Lake Co. v District Court, supra, this factor is immaterial. Furnishing his own team was analagous to the laborer who used his own lights and explosives in the Lewis case, and the woodsman using his own tools in the Minnesota case."

(2) "He was compensated by the amount of work done. Piecework does not constitute the laborer who does it an independent contractor. Lewis v. Detroit Vitrified Brick Co., and State etc. v. District Court, supra; Knicely v. W. Va. etc. R. R. Co., 17 L. R. A., (N. S.) 371; Ripley v. Priest, 169 Mich. 383."

(3) "Control of own working hours. This is not true. He could only work when and where the jammers were set. He could only haul one load a day and that is all anyone could haul from the camps to the mill in Cheboygan. He could only get a load when the loading crew gave it to him, and they could refuse him a load if the company wished."

(4) "Control of the amount of work done. See Lewis v. Detroit Vitrified Brick Co. and the other cases cited. Like any other laborer he could quit. The employer could also discharge him. In the Lewis case the court held the plaintiff to be a servant notwithstanding 'They (the laborers) furnished lights and explosives, or the cost of them, and were generally masters of the time and the efforts they should make.' "

(5) "Control of the manner of work. The statement in appellants' brief, 'Tuttle got his logs where he wished and was under no control while hauling,' is not borne out by the record as to getting the logs where he wished. He could only get logs at the skidways where the jammers were set. He did not control the manner of work done. Embury-Martin Lumber Company's woods superintendent testified:

'Q. And where they loaded was under your direction was it?'

'A. Yes sir, they couldn't load any other place only where we had our jammers set to load.'

As to control while hauling no one controlled any of the drivers either by the month, day or thousand, except when loading or unloading. There is no difference in this respect between admitted employes of the lumber company, paid by the month, and Mr. Tuttle.

'You said the man handled the load himself after the load was on the sleighs?'

'A. Yes sir, after he left the skidway—after he got on his load, why that was his load to go with—he handled that to the mill.'

'Q. That was so of those who hauled by the thousand as well as those that worked by the day?'

'A. Yes sir.

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'Q. So far as that was concerned there wasn't any difference between the two classes of men?'

'A. Not in regard to handling the load.' "

(6) "Freedom from supervision. This is not true. At the only points where drivers came in contact with any necessity of supervision, they were controlled and directed. They could only get loads where the jammers were set; they loaded the sleighs with their own teams under the direction of the employer's foreman or top loader, the employer's servants fastened the load on the sleighs, he drove over roads built and maintained by the employer to its mills at Cheboygan, where he was directed where to place the load for unloading. None of the drivers, either by the thousand or day or month unloaded or were required to assist in unloading. They could be controlled by the power of the employer to discharge. There is no testimony in the record to bear out the statement in appellants' brief: 'he did not have to unload his logs as did the employes of the company,' if by employes is meant drivers by the month. As far as living in the company's camps are concerned, living in camps or out of them does not bear on the question. The control of the means which the employer has over a servant does not go to the extent of controlling anything but the doing of the work which he has been engaged to do. One may be and is a servant of another without the control of the employer over his meals, lodging and personal conduct outside of working hours. I have failed to find any case anywhere, or any semblance of authority for the statement, that there is any rule or law that control of anything except work itself in which the laborer is engaged, has any bearing whatever on the question. As far as doing the work was concerned, that is, hauling logs to Cheboygan from these camps, there was no difference whatever between those who were paid by the day or month and Mr. Tuttle. Both were employed generally, although the rate of pay was different."

(7) "Tuttle owned the team he used and as owner had the right to manage it subject to the direction of the employer while doing the employer's work. He drove the team in loading and went ahead and backed up as directed by his employer's foreman. Any pieceworker who uses his own tools naturally cares for them. Tuttle's tools were a team of horses."

(8) "Right to hire substitute or assistant. This statement that Mr. Tuttle could have sent a substitute or another man with another team is not borne out by the record in any manner whatsoever. The contract between himself and the employer hereinbefore stated was for Tuttle to haul logs. No one else was mentioned. He, himself, personally, with his team was hired to haul logs. He asked for work and it was given to him. He had no more right to send a substitute or employ assistants at his employer's expense than a ditch digger has who sends a man in his place. If the employer accepts the sub-

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stitute, of course he would have to pay him, but the contract gave Tuttle no such privilege. If it did, however, Tuttle was killed and not a substitute or assistant. The testimony in the record that some men had more than one team hauling, or brought a load in and were paid for it, is beside the point. In one instance they made arrangements before hauling and in others they were volunteers whose labor was accepted and paid for."

In the recent case of Gall v. Detroit Journal Co., 158 N. W., 36 we had occasion to examine this question, and many authorities in our own court and some from other jurisdictions are cited in the opinion of Mr. Justice Person. There is a vast amount of learning upon this subject. In the examination of this question our attention has been called to more than one hundred cases in other jurisdictions. The copious note to Richmond v. Sitterding, 65 L. R. A., 445, and the notes to Messmer v. Bell, etc. Co., 133 Ky., 19; Vol. 19 Am. & Eng. Anno. Cas., 1, and Cochran v. Rice, (S. D.) reported in Am. & Eng. Anno. Cas., (1913-B) at page 570, will furnish an abundance of authority upon the subject.

In some cases much stress is laid upon the fact that the work to be performed is of an indefinite amount subject to discharge and control in that regard. Others, whether the employment is of a general, independent character, like that of draymen and common carriers, becomes the controlling question. We are of the opinion that the test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere that makes the difference between an independent contractor and a servant or agent, 26 Cyc., 1547.

In our opinion there was such control over the work of Tuttle, by the company, as makes it inconsistent to say that Tuttle was an independent contractor.

His work was limited by the right of the company to terminate it at any time, and it was for no definite period, or amount. The loading and unloading were under control of the company, both as to time and place. True, he was in charge of his team while going from the skidway to the mill,

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but that was true of all the drivers, whether working by the month or the thousand.

The most that can be said for the respondents is, that upon the evidence in the record, it might be for a jury to say, under proper instructions, whether the company participated and directed in the work of Tuttle to such a degree that the relation of master and servant existed, or whether he was an independent contractor. There was some evidence tending to show a custom. There was no evidence that Tuttle knew of any custom. Such evidence was admissible only on the ground that the parties were both cognizant of it, and must be presumed to have made their engagement with reference to it. There was no such evidence.

Pennell v. Transportation Co., 94 Mich., 247.

The real question in this case is, what was the relation which Mr. Tuttle sustained to the Embury-Martin Lumber Company?

In our opinion he was a person in service under employment of that company, and comes within the provisions of the Workmen's Compensation law. Whether or not the relation of master and servant exists in a given case, under oral contract, is often a question of fact, or of mixed law and fact, and it is to be proved like any other question. In our opinion there was evidence in the case that warranted the Industrial Accident Board in reaching the conclusion which it did, and the proceedings of that board must be affirmed.

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SUPREME COURT.

MYRTLE RAMLOW,
Applicant,
vs.
MOON LAKE ICE COMPANY,
and
OCEAN ACCIDENT & GUARANTEE CORPORATION, LTD.,
Respondents.

PROXIMATE CAUSE—DELIRIUM TREMENS—INTENTIONAL AND WILFUL MISCONDUCT.

Applicant's husband, William Ramlow, was injured while in the employ of respondent ice company, the injury consisting of a severe fracture of two bones of his right leg just above the ankle. Two days after the injury he suffered an attack of delirium tremens and died.

HELD: 1. That the fact that his system had been so weakened by intemperate habits that it was unable to withstand the effects of the injury, does not shift the proximate cause of his death from the injury to such intemperate habits.

2. That his failure under the circumstances of the case to inform the attending physician that he was a drinking man did not amount to intentional and wilful misconduct.

Certiorari to Industrial Accident Board.

Proceeding by Myrtle Ramlow against the Moon Lake Ice Company under the Workmen's Compensation Act for compensation for the death of her husband. Compensation was awarded by the Industrial Accident Board, and respondent brings certiorari. Affirmed.

Hatch, McAllister & Raymond, of Grand Rapids, Attorneys for applicant.

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Kleinhans, Knappen & Uhl, of Grand Rapids, Attorneys for respondents.

BIRD, J. William Ramlow, husband of claimant, was an employe of the defendant, Moon Lake Ice Company, of Grand Rapids. On June 3rd, 1914, while attempting to remove a bur from the axle of one of the company's wagons, he slipped and fell, causing a severe fracture of two bones in his right leg just above the ankle. He was removed to the hospital where the fracture was reduced and he was placed in bed. There was nothing unusual about his condition until the evening of June 5th, when he suffered an attack of delirium tremens, and died on the following morning. Application was made by the widow for an allowance, and the same was granted at the rate of $6.40 a week for 300 weeks.

(1) Counsel for the ice and insurance companies contend that the award should not have been made for the reason that the testimony shows that the attack of delirium tremens, and not the injury, was the proximate cause of his death. The record contains the testimony of four physicians who appeared to be qualified to speak on such matters, and they gave it as their opinion that the attack of delirium tremens was caused by the injury; further that it was not unusual for delirium tremens to develop about sixty hours after an injury, when the secondary shock sets in with patients who had been in the habit of using alcoholic liquors. Two physicians who testified for the defendants, disagreed with this view, but the record, taken as a whole, is very persuasive that the deceased would not have developed delirium tremens when he did, had it not been for the injury and the shock which followed it. The fact that his system had been so weakened by his intemperate habit that it was unable to withstand the effects of the injury, does not thereby shift the proximate cause of death from his injury to his intemperate habit. McCahill v. N. Y. Transportation Co., 20 N. Y., 221.

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It is said by counsel that this case is similar to that of McCoy v. Michigan Screw Company, 180 Mich., 454. The cases are dissimilar in the material respect, that in the case cited, the claimant by his own act, after receiving the injury, communicated gonorrheal germs to his eye by rubbing it, in consequence of which, he lost the use of it. It was clearly his own act after the injury which caused the loss of his eye. We are of the opinion that the finding of the Board upon this question should not be disturbed.

(2) A further contention is made that the conduct of Ramlow was unreasonable, amounting to wilful and intentional misconduct within the meaning of Section 12, Part II, of the Compensation Act. This is based upon the claim that deceased when asked by his attending physician if he was an alcholic, replied that he was not; that had he answered truthfully that he was, the treatment would have been different, and the attack might have been averted. Touching the habit of deceased in this respect, his foreman testified that he had known the deceased for 23 years, and that he had worked with him off and on for about 16 years, and that the deceased "used to take a drink once in a while, and sometimes quite often" but that "he never saw him in a state when he thought he had been drinking while on duty, and that his drinking did not interfere with his work, and that during the sixteen years he had known him, he had not known him as a drinking man." There is nothing in the record to show that the deceased understood to what extent a person must be addicted to the use of intoxicating liquors to become an alcoholic, neither is there anything to show that he knew that the question propounded had any bearing upon the treatment of his injury. We cannot say as a matter of law that the record discloses any wilful or intentional misconduct concerning his answer to the doctor's question. The extent to which he was addicted to the use of intoxicating liquors was a question of fact and the same having been determined by the Board, it is not within our

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power to review it. Boyne v. Storage & Cartage Co., 181 Mich. 278; Redfield v. Ins. Co., 183 Mich. 633.

The award must be affirmed.

SUPREME COURT.

SIDNEY DYER,
Applicant,
vs.
JAMES BLACK MASONRY & CONTRACTING COMPANY,
and
EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD.,
Respondents.

EMPLOYE—INDEPENDENT CONTRACTOR—CASUAL EMPLOYMENT.

The applicant was injured while assisting in unloading glass. He was doing work for the principal contractors on the David Stott Building in Detroit, pursuant to a sub-contract which he held from them. He was doing the work of unloading the glass at the time of his injury pursuant to a verbal arrangement with such principal contractors to assist in such unloading from time to time, said principal contractors to pay him for the work so performed.

HELD: 1. That the employment was not casual within the meaning of the Workmen's Compensation Act, the applicant being employed to do a particular service recurring somewhat regularly with the fair expectation of continuance for a reasonable period of time.

2. That the work done was individual labor performed for respondent by the applicant and entirely outside the terms and scope of the glazing contract.

Certiorari to the Industrial Accident Board.

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Proceedings by Sidney Dyer against the James Black Masonry & Contracting Company under the Workmen's Compensation Act for compensation for injuries sustained. Compensation was awarded by the Industrial Accident Board, and respondent brings certiorari. Affirmed.

Choate, Robertson & Lehmann, of Detroit, Attorneys for applicant.

Frederick T. Witmire, of Detroit, Attorney for Respondents.

STONE, C. J. This case is before us upon certiorari to the Industrial Accident Board; the case in its progress having regularly reached the Board, which granted compensation to the claimant, from which order the respondent appeals.

Claimant was injured December 10, 1914, at the David Stott Building in Detroit. He and his partner, John Ross, were, at the time of the accident, engaged in doing the glazing on the building in question under the following written contract with the principal contractor:

"Detroit, Nov. 19, 1914.

"Sidney Dyer & John Ross,
City.
Gentlemen:

We hereby accept your proposition for furnishing all labor and materials necessary (with the exception of the glass) for glazing all the glass in the David Stott Building, as called for in the revised Specifications dated June 2nd, 1914 and the plans, for the sum of Three hundred and twelve ($312.00) payable on the completion of the work and the acceptance of the Architects, Marshall & Fox.

It is understood between us that the glass is to be furnished you at the site of the said building and you are to take it from there and glaze it.

It is also understood that you are not to glaze any glass which is called for to be done by any other contractor rather than the glazing contractors. The glazing contractors are Sidney Dyer and John Ross, working under the name of Dyer & Ross.

It is mutually understood that the glazing contractors are to be

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responsible and will replace all glass broken by them in handling or setting the glass.

James Black Masonry & Contracting Co.,
By A. E. Black, (Signed)
Vice-President.

EAB:CVR

Nov. 19, 1914,
Accepted by Dyer & Ross,
By Sidney Dyer (signed), Glaz. Contractors."

The principal contractor finding that it was necessary in the progress of the work to have some person assist in, and look after the delivering of the glass at the building and see to the unloading of the glass, arranged with the claimant to do this work, from time to time, as the glass arrived, for which services claimant was to receive, and did receive payment from the principal contractor. The glass was in fact delivered, from time to time, at the building, under the contract between the principal contractor and the Pittsburgh Plate Glass Company.

The Industrial Accident Board found that in doing the work of glazing under said written contract the claimant and his partner were independent contractors. The Board further found as follows:

"The arrangement made with the applicant under which he was to look after the delivery and unloading of the glass fairly includes giving such reasonable assistance in unloading as he might deem necessary. It cannot reasonably be restricted to merely overseeing and directing, but fairly included any reasonable assistance in unloading the glass which was reasonably necessary to accomplish the object for which he was employed. The injury therefore which he received in assisting in the unloading arose out of and in the course of his employment.

The arrangement under which applicant was to look after and assist in the unloading of the glass was no part of his contract work. While it is doubtless true that the arrangement was made with him because he was doing the glazing on the building, it might have been made by the principal contractor with any other person who happened to be in the vicinity and who could conveniently do the work at such times as the loads of glass arrived at the building. It seems clear that the applicant was the employe of the principal contractor for the work in question, and that he is entitled to compensa-

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tion for the injury unless the employment was casual within the meaning of the Workmen's Compensation law.

It should be noted that this work was being done by Sid Dyer individually, and not by the firm of Dyer & Ross. It was billed as an individual account with Mr. Dyer and paid as such. The date of the contract for the glazing work was November 19, 1914; the injury occurred December 10, 1914; and it appears from the evidence that the work was not finished until the latter part of March. It also appears that the work to be done was periodic in its nature, that is, from time to time, as the loads of glass arrived at the building. The building was a large one and the time during which this work would have continued had it not been for the accident, would extend over a number of months. While it is true it was not steady work, or work that consumed a larger portion of his time, yet it recurred at intervals with the progress of the work and would have continued until the job was finished. Under these facts we think that the employment was not casual."

There was testimony of the claimant to the following effect:

Q. "Now, you were working there on this contract were you?"
A. "Yes sir."
Q. "While you were working on this contract state whether or not you were engaged to do other work?"
A. "I was engaged to do other work, that is Mr. Brennan asked me to look after the delivering of the glass, which was not in the contract. I told him. I says, 'Well,' I says—He says, 'I am pretty busy and I would like to have you look after that work.' I said 'You will have to do the signing; you will have to sign for the glass when it is delivered.'"
Q. "Did you help with the delivery of the glass?"
A. "Yes sir."
Q. "Do you know when the first load was delivered?"
A. "Why, I cannot say when the first load was delivered. It was prior to December—it was probably somewhere around Thanksgiving that the first glass was delivered there."
Q. "Did you help with the delivery of that?"
A. "Yes sir."
Q. "Did you help unload it?"
A. "Yes sir."
Q. "Put it in the—"
A. "(Interrupting) Put it in the building."
Q. "Was that part of your duty under this contract?"
A. "No sir, it was not part of my duty at all."

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Q. "Was Mr. Brennan around at that time when you were doing this?"

A. "Yes sir, Mr. Brennan passed through the building while I was doing that."

Q. "When did the second load come?"

A. "Well, it might have been ten days after."

Q. "Did you help with the delivery of that?"

A. "Yes sir."

Q. "Help unload it?"

A. "Yes sir, I put my hands on the case steadying it."

Q. "Was there help needed there at that time?"

A. "Why, it is always in taking off glass, it requires somebody that is accustomed to that kind of work, for to do it, and they were kind of shorthanded, and I naturally helped out. I thought that was what Mr. Brennan wanted me to do, he asked me to look after the delivering of it."

Q. "State whether or not you were injured at the time that you were assisting in unloading the second load?"

A. "I was."

Witness then proceeded to describe the injury.

The substance of this testimony was repeated upon the cross-examination of the witness. No question was raised that Mr. Brennan, who was the superintendent of the respondent, made the arrangement with the claimant, as testified to by the latter, that he had authority to do so, and that claimant was personally paid for such extra services by check signed in the name of the respondent, by Mr. Brennan as superintendent.

The questions raised by the assignments of error relied upon by appellant are as follows:

(1) Whether applicant was an employe within the meaning of the Workmen's Compensation Act, or one whose employment was but casual, and whether the finding of the Industrial Accident Board that applicant was an employe at the time of the injury was justified by the evidence?

(2) Whether applicant was an employe or independent contractor at the time of the injury?

A part of Sec. 7 of Part I, of Act No. 10 of the Public Acts of 1912, defines the term "employe" as follows:

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"Every person in the service of another under any contract of hire, express or implied, oral or written, * * * but not including any person whose employment is but casual or is not in the usual course of the trade, business, profession or occupation of his employer."

(1) It is urged by appellant that the employment of claimant in doing the work in which he was engaged was but casual; and it is said that the word "casual," as used in the section quoted, should be taken in its ordinary sense. That there is nothing in the context of the law to indicate that the legislature intended to give it an enlarged or unusual meaning. The following definition is quoted from 6 Cyc., 701:

"Casual. Not designedly brought about; happening by accident or brought about by an unknown cause."

The following definition is quoted from the laws of Nebraska:

"The word 'casual' shall be construed to mean 'occasional'; coming at certain times without regularity; in distinction from stated or regular."

It is the claim of counsel for appellant that the instant case is controlled by Gaynor's Case, 217 Mass., 86; and Cheever's Case, 219 Mass., 244, which were decided under a statute exactly like ours. We are unable to agree with counsel that those cases are controlling of the instant case, and we think they are readily distinguished.

In Gaynor's Case the deceased employe was a waiter employed at the time his injuries were received by T. D. Cook & Company, Incorporated, a caterer, having a regular place of business in Boston. It had a contract to serve a banquet at Mount Holyoke College, South Hadley, and on the day before engaged deceased for service at that banquet. Its agent told the deceased that if he would report at the South Station, Boston, the next morning, he could go to South Hadley at its expense with the other waiters. The wage for the service was to be $4.00, together with transportation

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from Boston to South Hadley, and return. The deceased reported at seven o'clock on the morning of the next day, reached South Hadley at half-past eleven o'clock of the forenoon, and was injured while preparing to serve the banquet. This was the first time he had ever worked for this employer. The work was finished at five o'clock in the afternoon, and the decedent then would have been entitled to $4.00, and would have been at liberty either to return to Boston at the expense of his employer, or to go elsewhere on his own account. It was a part of the regular business of the employer to provide and serve banquets, but for such service no men were regularly employed. The custom of the catering business is that such banquets are served by waiters secured for the particular occasion. Such a waiter might work for different employers on the same day, or for many different employers on successive days. The court, after stating the above facts, said:

> The point to be decided is whether the deceased was an employe as defined in the Workmen's Compensation act."

Quoting language exactly like that contained in our own statute, the court further said:

> "The crucial words to be construed are those contained in the exception out of the class of employe of 'one whose employment is but casual.' The word 'casual' is in common sense. Its ordinary signification, as shown by the lexicographers, is something which comes without regularity and is occasional and incidental. Its meaning may be more clearly understood by referring to its antonyms which are, regular, systematic, periodic and certain." * * *
>
> "It would be difficult to conceive of employment more nearly casual in every respect than was that of the employe in the case at bar. The engagement was for a single day, and for one occasion only. It involved no obligation on the part of the employer or employe beyond the single incident of the work for four or five hours at the college. That would have had its beginning and ending, including the outward and returning journeys (but for the unfortunate accident), within a period of less than twenty-four hours. The relation between the waiter and the caterer had no connection of any sort with any events in the past. Each was entirely free to make other arrangements for

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the future, untrammelled by any express or implied expectations of further employment."

We think the Gaynor case is so clearly distinguished from the instant case that further comment is unnecessary.

In Cheever's Case, supra, a teamster, having three or four separate horses and teams, who was sent for whenever he was needed by the proprietor of a coal yard doing a retail coal business, and at such times was employed by such coal dealer for periods of a number of successive days, but "for no fixed duration of time and for no specified job," and while so employed "worked the same as any other (of the coal dealer's regular men,)" was injured in the course of such employment. It was held that he was not entitled to compensation, because his employment was but casual within the meaning of the Massachusetts statute then in force.

It will be observed that in Cheever's case the employment was for no fixed duration of time, and for no specified job, thus distinguishing it from the instant case.

Our attention is also called by appellant's counsel to numerous English cases. While they can all be distinguished, it should be borne in mind that the English act differs from ours. In the English act is the following language:

"Workman does not include a person whose employment is of a casual nature, *and* who is employed otherwise than for the purpose of the employer's trade or business."

Under the English act, to constitute a defense it must appear that the employment was of a casual nature, and that it was not in the usual course of the employer's trade, occupation or profession. Our statute uses the word "or," where the English has the word "and," so that while under the English statute both defenses must exist together in order to defeat liability, it is sufficient under the Michigan act if either exists without reference to the other.

Can it be said that the employment of the claimant in the instant case was purely a chance employment? Was it not

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rather regular, stated or periodic? Judge Ruegg, in his work entitled "Employer's Liability and Workmen's Compensation," in discussing the English cases at page 276, says:

"A person who is employed one or more days in each week to do work which must be done, or which it is known it will be advisable to do at these times, is not casually employed."

"Indeed, whenever the same person under contract with an employer to do work at recurring times which must, or which it is known beforehand it will be convenient to do at such recurring times, the employment of such person it is believed, is not of a casual nature. * * * * To take one or two illustrations: If A employs B to work one day, or half a day a week in his (A's) private garden subject to his control, B is not casually employed; he is regularly employed at recurring ascertained times."

"Further, if, in the same illustration, the times are not strictly defined, but the contract is that B shall do the work required in the garden, as it is required from time to time, no fresh contract or engagement being contemplated between the parties, though a discretion may be left in the workman to select the time or times of work, it is believed the employment is not casual, for though the work may be of a casual nature, B is under contract to do it as and when it arises, consequently his employment is not casual."

"Much must depend upon the certainty of the work recurring at times which, though they cannot be fixed definitely, yet can be fixed generally, and the work when it arises having to be done by the same person."

In the instant case it is fair to suppose that the general contractor knew how much glass was to be delivered at the building. It became necessary in the interest of the business of the general contractor to have the delivery of the glass looked after, and supervised, and claimant was employed for that purpose. That, as the glass was to be delivered as the work progressed on recurring occasions, it certainly cannot be said any of the necessary work to be done in furthering the job or enterprises was casual, for it was sure to occur and recur in the operation of the job. There was an element of certainty in the work recurring at times which, though they could not be fixed definitely, yet were fixed generally by the agreement to look after and assist in unloading the glass as it arrived, from time to time.

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In our opinion the employment of the claimant was not casual. It has been held that the employment is not casual within the meaning of that term as used in the Employers' Liability act, where one is employed to do a particular part of the service recurring somewhat regularly with the fair expectation of the continuance for a reasonable period.

Sabella v. Brezileiro, (N. J. L.) 91 Atl., 1032;
Howard's Case, 218 Mass., 404.

In Thompson v. Twiss, decided by the Supreme Court of Errors of Connecticut, on April 19, 1916, (97 Atl., 328,) under a statute like the English act, it was held that the term "casual employment" means occasional or incidental employment, the employment which comes without regularity, and, if the employment be upon an employer's business for a definite time, as for a week, or a month, or longer, or if it be for a part of one's time at regularly recurring periods of time, it is not a casual employment, whether the contract of service or the nature of the service be regarded; and hence a claimant, employed by defendant in the development of several tracts of land, who, if he satisfied his employer, would remain to the end of the work, requiring at least a number of weeks, was not engaged in a casual employment.

(2) We think that the Industrial Accident Board was correct in its finding that the work being done at the time of the accident was not under the terms of the written contract of November 19, 1914, but was individual labor being performed by the claimant in the employment of the respondent, and entirely outside the terms and scope of the written contract. We find no error in the conclusion reached by the Industrial Accident Board, and its order is affirmed.

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BY INDUSTRIAL ACCIDENT BOARD.

DEPUTY SHERIFF AN OFFICER.

In *Sutton* vs. *Chippewa County* the applicant was a Deputy Sheriff of Chippewa County, and while attempting to make an arrest in the regular discharge of his duty he was shot and killed. The sole question in the case is whether a deputy sheriff is an officer within the meaning of the Michigan Workmen's Compensation Law.

Held, That he was an officer within the meaning of the Act, and that his dependents were not entitled to compensation.

LONGSHOREMEN—EMPLOYES UNDER THE LAW.

It was claimed by the employer that the longshoreman injured in unloading lumber from a vessel at Bay City was not an employe within the meaning of the law. That the company contracted with a business agent of the Longshoremen's Union to unload the cargo of lumber from the vessel at a certain stipulated price per hour for the men engaged. That the business agent was to employ the men and perform the work, the employer merely to pay for the result.

Held, That the men employed in unloading the vessels were employes within the meaning of the Workmen's Compensation Law, and that they were hired through the business agent of the organization for the purpose of doing the work in question. Compensation awarded.

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PARTIAL DEPENDENTS—NO DEDUCTION FOR BOARD.

Where the wage earner is a minor child, and compensation is claimed by parents as partial dependents, no deduction is to be made for the board of such child. This position is supported by the decision of the Supreme Court of Massachusetts in the case of *Gove* vs. *Royal Indemnity Company,* 111 N. E. Rep. 702.

RULES AND SYSTEM OF REPORTING ACCIDENTS AND THE MAKING AND KEEPING RECORD OF ADJUSTMENT AND PAYMENT OF COMPENSATION.

WHAT ACCIDENTS TO BE REPORTED.

Rule 1. All accidents which result in disability continuing for more than one full working day shall be reported to the Board; all accidents involving the loss of a member shall be so reported irrespective of the question of disability resulting; all accidents causing death shall be reported to the Board.

WHEN TO BE REPORTED.

Rule 2. All employers subject to the Compensation Law shall make reports to the Board weekly of all accidents to their employes which come within the classes of accidents designated in Rule 1. Such reports shall be on and in accordance with the requirements of the weekly report blank, Form No. 5-a.

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FIFTEENTH-DAY REPORT.

Rule 3. In all cases where the disability resulting to the injured employe continues for more than fourteen days, a further report, on and in accordance with the requirements of report blank, Form No. 6, shall be made to the Board on the Fifteenth day of such disability: Provided, That in all cases where the accident causes the loss of a member or death, such report on Form No. 6 shall be made to the Board within ten days after such accident or such death, as the case may be.

IMMEDIATE REPORT REQUIRED.

Rule 4. In all cases where a claim for compensation is filed with the Board by an injured employe, if it appears that the report required by Rule 3 has not been made by the employer on account of disagreement as to the continuance of the disability or for any other reason, the Board shall thereupon require such employer to forthwith file a report of the accident on and in accordance with the requirements of blank Form No. 6.

AGREEMENT IN REGARD TO COMPENSATION.

Rule 5. When an agreement in regard to compensation is made between the employer and the injured employe or his dependents, the same shall be in writing on and in accordance with Form No. 10, and submitted to the Board for approval.

SUPPLEMENTAL REPORT.

Rule 6. In cases where death occurs, a supplemental report shall be forthwith filed on Form No. 7, giving information as to dependents of deceased.

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RECEIPTS FOR COMPENSATION.

Rule 7. After an agreement in regard to compensation is made between the employer and the injured employe or his dependents, and approved by the Board, and also in cases where an award of compensation is made, receipts for weekly payments of compensation on Form No. 11, signed by such employe or his dependents, shall be filed in the office of the Board from time to time as such payments are made.

FINAL REPORT.

Rule 8. When the disability of the injured employe terminates; also, when the payment of the compensation for the loss of a member, or death, has been fully made, final report thereof shall be filed with the Board, on and in accordance with Form No. 7-a, together with settlement receipt on and in accordance with Form No. 12, signed by the employe or his dependents, as the case may be.

Rule 9. Wherever the word "employer" is used in the foregoing rules, numbered from 1 to 8 inclusive, it shall be construed to cover the employer, also the insurance company carrying the risk, or the Commissioner of Insurance, as the case may be.

HOW TO REPORT ACCIDENTS.

On the following pages will be found a concrete case, displaying the correct method of reporting an accident, and also the procedure to be followed when payment of compensation is made. It will be observed that ALL accidents resulting in disability of one full working day or more are recorded on the weekly report form (No. 5-a). If incapacity exceeds fourteen days, a detailed report on form No. 6 will be filed on the fifteenth day, and the latter will be followed at an interval of not to exceed fifteen days by an agreement

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in regard to compensation, executed on form No. 10. When an "Agreement in Regard to Compensation" is reached, payments are to be made weekly, and receipts taken for the same upon form No. 11, entitled "Receipt on Account of Compenstation," which are to be filed with the Industrial Accident Board. When the final payment is made a "Settlement Receipt" is taken upon form No. 12, and this is submitted together with form No. 7-a, "Final Report of Accident," showing that the case is closed and completing the files of the Board. Form No. 7 will be filed if death results so that information may be had as to dependents.

THINGS TO REMEMBER.

Employers, and agents who are handling the reporting and adjusting of accidents, will facilitate the work of the Industrial Accident Board by paying careful attention to the "Rules and System for Reporting and Handling Accidents" and guiding themselves accordingly.

The *personal signature* of the injured employe, or dependents to whom compensation is to be paid, is required and *must* always appear on the "Agreement in Regard to Compensation," "Receipts on Account of Compensation" and "Settlement Receipts." Typewritten signatures will not be accepted, and all papers so signed will be returned for correction. The mark of an employe who cannot write will, when properly witnessed, be accepted. An "Agreement in Regard to Compensation" *must* bear the signature of the injured man or his dependents. It must also bear the signature of the employer, and when such signature is made by an officer or agent of the employer, the signature of such officer or agent must be accompanied by an appropriate designation of his official position or agency. The execution of the agreement must be attested by two witnesses, as indicated in the form.

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Incomplete or improperly executed papers will be returned for correction.

Illegible signatures should be written in duplicate on receipts and agreements to facilitate the work of the filing department, so that confusion in the indexing of and reference to cases can be avoided. This will be helpful to employers as well as to the Board.

"First Report of Accident" submitted on Form No. 6 should give the correct name, address, (street and number) and age of the injured employe, as well as a concise description of the accident, the nature of the injury, and all other information called for on the blanks. All of the other reports required should be equally full and accurate.

The Board has prepared blanks for reports required to be made to it, specifying the information to be given by appropriate spaces, headings and questions. ALL OF THESE MUST BE FILLED IN AND SUITABLY ANSWERED IN EVERY REPORT. THE MERE FILLING IN OF PART OF THE BLANK DOES NOT CONSTITUTE A REPORT AND WILL NOT BE ACCEPTED. The fundamental rule everywhere in the matter of reports is, that ALL QUESTIONS MUST BE ANSWERED. The person making the report is not at liberty to select a few of the matters or to decide for himself those that will remain unanswered. If in a few instances (and these instances should be few), it is impossible to give the answer, it should be so stated in the report.

WHEN COMPENSATION IS DUE SEE THAT THE INJURED EMPLOYE OR HIS DEPENDENTS RECEIVE SAME WITHOUT DELAY.

SEE THAT INJURED EMPLOYE RECEIVES IMMEDIATELY THE MEDICAL AND HOSPITAL SERVICE TO WHICH HE IS ENTITLED UNDER THE ACT.

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SAMPLE CASE, REPORTS, ETC.

1. Weekly Report Form.
2. Report of Accident.
3. Supplemental Report of Accident.
4. Final Report of Accident.
5. Agreement in regard to Compensation.
6. Receipt on account of Compensation.
7. Settlement Receipt.
8. Notice to Employer of Claim for Injury.

Properly made on the blanks of the Board, the matter printed on the blank being *in Roman type,* and the matter written into such blanks in preparing the same for execution *is printed in Italics.*

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Form No. 5A WEEKLY REPORT FORM.*

Date received..... (Do not fill in.) For week ending *May 16, 1916.*

Name of Employer.....*Sherwood Motor Company,*.....
Address (Street and Town).....*767-73 Water Street, Franklin, Michigan*.....
Nature of Business.....*Motor Manufacturing*.....
Signature of person making report....*F. M. CRANDELL*....Position....*Chief Clerk.*

Date of Injury.	Name.	Nature of Injury.	Occupation.	Age.	Time lost Days.	Medical Expense
Accidents Reported for the First Time.						
5/12	*Alex Sherbrook*	*Broken Ribs*	*Trucker*	*40*	*4*	*$35*
5/15	*John Flanagan*	*Strain of Left Wrist*	*Bench Hand*	*20*	*1*	*00*
5/13	*E. H. Gladstone*	*Cut on 4th finger*	*Drill Press Man*	*18*	*2*	*1*
Accidents Reported on Previous Weekly Report, Disability Continuing (but less than fifteen days.)						
5/4	*John K. Ledyard*	*Contused right foot*	*Grinder*	*29*	*12*	*$45*
5/6	*Samuel Reed*	*Broken Arm*	*Tester*	*35*	*10*	*65*
5/5	*Edward Murray*	*Broken Leg*	*Trucker*	*19*	*11*	*48*
Accidents Previously Reported but included here for the purpose of giving Medical Expense which we were unable to furnish at date of former report.						
5/11	*R. M. Huff*	*Lacerated Scalp*	*Foreman*	*45*	*5*	*$4*

FORWARD WEEKLY TO INDUSTRIAL ACCIDENT BOARD, LANSING, MICH.

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REPORT OF ACCIDENT WHERE COMPENSATION IS INVOLVED.

Form No. 6 is to be filed only in compensation cases, i. e., when temporary disability has exceeded fourteen days, or when an accident results in the loss of a member, or in death, or permanent disability. When No. 6 is filed, it should be submitted promptly on the fifteenth day following the injury, and it should be followed at an interval of not to exceed fifteen days by an "Agreement in Regard to Compensation" on form No. 10.

When form No. 6 is filed the Board will take notice that compensation is involved and request for an agreement in regard to the same will be made if form No. 10 is not then on file in the office of the Industrial Accident Board.

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Form No. 6.
Date received.....
(Do not fill in.)

MICHIGAN INDUSTRIAL ACCIDENT BOARD.

Report of Accident.

(To be made only in cases involving loss of a member, or death, or disability continuing more than fourteen days.)

1. Name of employer.....*Sherwood Motor Company*.....
2. Address of employer.....*767-73 Water Street, Franklin, Michigan*.....
3. Nature of business.....*Motor Manufacturing*.....
4. Location of plant or place of work where accident occurred, if not at office address .....*Same as No. 2*.....
5. Name of injured employe.....*John K. Ledyard*.....
6. Address of injured employe (including street No.).....*303 Main Street, Franklin, Mich*.....
7. Occupation of injured.....*Grinder*..... 8. Department or branch of work.....*No. 8 of Shops*.....
9. Was this regular occupation?.....*Yes*..... 10. If not, state regular occupation.....
11. How long so employed?.....*16 months*..... 12. Age.....*29 yrs*.....
13. Sex.....*Male*..... 14. Place of birth.....*England*.....
15. Single, married, widowed or divorced.....*Married*.....
16. Number of children under 16 years.....*Three*.....
17. Date of accident.....*May 4, 1916*..... 18. Hour of accident....*3 P. M.*
19. Hour injured person began work that day.....*7 A. M.*.....
20. Was full wage paid for day of injury?.....*Yes*.....
21. Wages or average earnings per day....*$3*.... 22. Working hours per day..*9 hrs.*
23. Days worked per week.....Six.....
24. Place of accident in detail.....*Department No. 8, Sherwood Motor Company Shops*.....
25. Cause and manner of accident.....*Large piece of steel fell on his foot, crushing same*.....
26. Nature and extent of injury.....*Severe contusion of right foot, bones of second and third toes broken*.....
27. Name and address of attending physician.....*E. J. Parker, 121 Atwater St., Franklin*.....
28. Was injured taken to hospital, if so, give name and address?.....*City Hospital Saginaw Street*.....

Signature of person making out report.....*F. M. CRANDELL*.....
(Original signature in ink required, otherwise will be returned.)
Position.....*Chief Clerk*.....
(State clearly your position, official or otherwise, with the employer or insurer.)
Date of report.....*May 18, 1916*.....

INSTRUCTIONS.

The time for making this report in cases where the accident involves the loss of a member, or death, is within ten days after the accident. Where the accident results in disability only, this report is to be made on the fifteenth day after the accident.

In case the accident causes the loss of a member, state exactly what, and the precise point of amputation: For example, the index finger of the right hand at the second joint, or the left arm at the elbow; the right eye, etc.

ANSWER THE QUESTIONS ON THIS BLANK FULLY. INCOMPLETE OR INDEFINITE REPORTS WILL BE RETURNED FOR CORRECTION.

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SUPPLEMENTAL REPORT.

The following form, No. 7, "Supplemental Report of Accident," is to be submitted in addition to form No. 6 if death results so that knowledge as to names of all known dependents and such other information as desired may be on record in the offices of the Industrial Accident Board.

Form No. 7.
Date received..... (Do not fill in.) File No. of accident..... (Do not fill in.)

MICHIGAN INDUSTRIAL ACCIDENT BOARD

Supplemental Report of Accident

1. Name of employer.....*Sherwood Motor Company*.....
2. Address of employer.....*767-73 Water Street, Franklin, Michigan*.....
3. Name of injured person.....*Peter Jones*.....
4. State whether injury resulted in death, or in temporary, partial or total disability .....*Death*.....
5. If at hospital give name and location.....*City Hospital, Saginaw St., Franklin*
6. If not yet resumed work, state probable period of further disability.....
7. Did you furnish all medical aid required during first three weeks?.....
8. Amount of compensation paid to date..... 9. No. of weeks.....
10. Has injured employe returned to work?.....
11. If so, give date..... 12. Date of accident.....*May 4, 1916.*
13. If injury resulted in death, give names, ages, relationship and address of ALL dependents:

Name.	Age.	Relationship.	Address.
.....*Mary Jones*.....	..*35*..	.....*Wife*.....	...*Franklin, Michigan*..
.....*George Jones*.....	..*13*..	.....*Son*.....	...*Franklin, Michigan*..
.....*Muriel Jones*.....	...*6*..	...*Daughter*...	...*Franklin, Michigan*..
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

14. Signature of person making report.....*F. M. CRANDELL*.....
15. Position.....*Chief Clerk*..... Date of report.....*May 18, 1916.*

The report called for in this blank is required to be made one month after first report is sent in. Use this form for final report if death results during interim.

INSTRUCTIONS.

In case the accident causes the loss of a member, state exactly what, and the precise point of amputation: For example, the index finger of the right hand at the second joint, or the left arm at the elbow; the right eye, etc.

ANSWER THE QUESTIONS ON THIS BLANK FULLY. INCOMPLETE OR INDEFINITE REPORTS WILL BE RETURNED FOR CORRECTION.

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REPORT AT CLOSE OF CASE.

"Final Report of Accident" is to be sent in after the last payment of compensation is made and is to accompany the "Settlement Receipt." In addition to giving the date of accident and date of return to work it will also contain information as to the total amount of compensation paid and the total medical and hospital cost. The latter is no inconsiderable item in the cost of administering a compensation law and for statistical purposes in displaying total costs is invaluable and should therefore never be omitted.

Form No. 7 A.
Date received..... (Do not fill in.) File No. of Accident..... (Do not fill in.)

MICHIGAN INDUSTRIAL ACCIDENT BOARD

Final Report of Accident.

1. Name of employer.....*Sherwood Motor Company*.....
2. Address.....*767-79 Water St., Franklin, Mich*.....
3. Name of person injured.....*John K. Ledyard*.....
4. Occupation.....*Grinder*.....
5. Wages.....*18.00 per week*.....
6. Total amount of compensation paid.....*$81.00*.....
7. Number of weeks.....*Nine*.....
8. Total medical and hospital cost.....*$45.00*..... (Exclusive of services of company surgeon.)
9. Date payment completed.....*July 6, 1916*.....
10. Date of accident....*May 4, 1916*.. 11. Date of return to work..*July 6, 1916*..
12. Signature of person making report.....*F. M. CRANDELL*.....
13. Position.....*Chief Clerk*.....
14. Date of report.....*July 8, 1916*.....

AGREEMENT.

The "Agreement in Regard to Compensation" is to be executed in all cases involving compensation. If payment is to be made for specific indemnity, such as the loss of a finger, etc., so specify giving thereon the number of weeks involved. If injuries other than specific loss have been sustained,

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specify that payment of compensation will be made during period of disability. Specific loss is not limited to amputation. There may be permanent loss of function resulting from the injury, and agreement should cover such permanent loss.

Form No. 10.

AGREEMENT IN REGARD TO COMPENSATION.*

We,.....*John K. Ledyard*.....
(Name of the injured employe or dependents)
residing at city or town of.....*Franklin, Mich*.....
and.....*Sherwood Motor Company*.....
(Name of employer, insurance company or commissioner of insurance)
have reached an agreement in regard to compensation for the injury sustained by said employe while in the employ of.....*Sherwood Motor Company*.....
.....*Franklin, Michigan*.....
(Name and address of employer)

The time, including the hour and date of accident, the place where it occurred, the nature and description of the injury, and other cause or ground of claim, are as follows:

The accident occurred May 4, 1916, 10:30 A. M. Department No. 8 Sherwood Motor Company Shops. A large bar of steel fell on the foot of the injured causing a severe contusion, the bones of the second and third being broken.....
.....
.....
.....

The terms of the agreement follow:

The average weekly wage being.....*Eighteen ($18.00)*.....DOLLARS, it is agreed that compensation be paid at the rate of.....*Nine ($9.00)*.....
.....DOLLARS, per week, during disability (.....)
(If permanent injury results cross out "disability" and insert specific number of weeks) in accordance with the provisions of the Michigan Workmen's Compensation Law.

WITNESS. (2 witnesses required when signature is made by mark)

.....*M. R. REMINGTON*.....
.....*120 John St., Franklin, Mich*.....

.....*A. R. BLAKSLEY*.....
.....*917 Genesee St., Franklin, Mich*.....

.....*JOHN K. LEDYARD*....
(Signature of employe or dependent)

....*SHERWOOD MOTOR CO*...
(Name of employer, insurance company or insurance commission)

By.....*J. C. SHERWOOD, Secy*
(Signature of agent or representative)

.....*Secretary*.....
(Position)

Dated at.....*Franklin, Michigan*.....this..*18th*..day of..*May*....*1916*.

*NOTE—If the employer, or the insurance company carrying such risk, or Commissioner of Insurance, as the case may be, and the injured employe reach an agreement in regard to compensation under this act, a memorandum of such agreement shall be filed with the Industrial Accident Board, and if approved by it, shall be deemed final and binding upon the parties thereto. Such agreement shall be approved by said board only when the terms conform to the provisions of this act—Section 5, part III.

AGREEMENT NOT ACCEPTED UNLESS WITNESSED AND SIGNED IN INK.

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COMPENSATION RECEIPTS.

"Receipts on Account of Compensation" are to be taken when payments are made, the same to be filed with the Industrial Accident Board.

Form No. 11.

RECEIPT ON ACCOUNT OF COMPENSATION.

RECEIVED OF .....*Sherwood Motor Company*..... the sum of
(Name of employer, insurance company or commissioner of insurance.)
.....*Nine*.....dollars and.....*No*.....cents being the proportion of the weekly wages of my*.....*self*.....from the..... *18th*.....day of.....*May*.....*1916*, to the.....*25th*.....day of .....*May*.....*1916*, under the Michigan Workmen's Compensation Law, subject to review by the Industrial Accident Board, said accident occurring on the .....*fourth*.....day of.....*May*....., *1916*, while in the employ of .....*Sherwood Motor Company, Franklin, Michigan*.....

$.....*9.00*.....

Witness.....*M. R. REMINGTON*.....
(Signature.)

Address.....*120 John St., Franklin, Mich*.....

Date.....*May 26th, 1916*.....

.....*JOHN K. LEDYARD*....
(Signature of employe.)

.....*303 Main Street*.....
(Street and number.)

.....*Franklin, Michigan*.....
(City or town.)

If the employer, or the insurance company carrying such risk, or commissioner of insurance, as the case may be, and the injured employe reach an agreement in regard to compensation under this act, a memorandum of such agreement shall be filed with the Industrial Accident Board, and, if approved by it, shall be deemed final and binding upon the parties thereto. Such agreement shall be approved by said board only when the terms conform to the provisions of this act.—Section 5, part III.

*Self, husband, or other, as the case may be.

RECEIPTS NOT ACCEPTED UNLESS WITNESSED AND SIGNED IN INK.

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RECEIPT WHEN LAST PAYMENT IS MADE.

The "Settlement Receipt" is evidence, when signed by the recipient of compensation and a witness, that all payments have been made in accordance with the "Agreement in Regard to Compensation," and should contain not only the amount for the current week, but also the entire amount paid by the employer as relating to the particular accident. This receipt should be accompanied when sent to the Board by a "Final Report of Accident," form No. 7-A.

Form No. 12. SETTLEMENT RECEIPT.

This receipt means a final settlement. Do not sign it unless you intend to end payments of compensation and close the case.

RECEIVED OF.....*Sherwood Motor Company*.....
(Name of employer, insurance company or commissioner of insurance.)
the sum of.....*Nine*.....dollars and.....*No*.....cents, making in all, with weekly payments already received by me, the total sum of..... *81*.....dollars and.....*00*.....cents in settlement of compensation under the Michigan Workmen's Compensation Law, on account of injuries suffered by my*.....*self*.....on or about the.....*fourth*.....day of.....*May* ....., *1916*, while in the employ of.....*Sherwood Motor Company, Franklin,*
(Name of employer, city, or town, street and number.)
Michigan.....subject to review and approval by the Industrial Accident Board.
Witness my hand this.....*eighth*.....day of.....*July*....., *1916*.

Witness.....*A. R. BLAKSLEY*..... .....*JOHN K. LEDYARD*....
(Signature of employe.)

Address.....*917 Genesee St., Franklin, Mich*..... .....*303 Main Street*.....
(Street and number.)

....*Franklin, Michigan*.....
(City or town.)

If the employer or the insurance company carrying such risk or commissioner of insurance, as the case may be, and the injured employe reach an agreement in regard to compensation under this act, a memorandum of such agreement shall be filed with the Industrial Accident Board, and if approved by it, shall be deemed final and binding upon the parties thereto. Such agreement shall be approved by said board only when the terms conform to the provisions of this act.—Section 5, part III.

*Self, husband, or other, as the case may be.

RECEIPT NOT ACCEPTED UNLESS WITNESSED AND SIGNED IN INK.

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NOTICE TO EMPLOYER OF CLAIM FOR INJURY.

The following form No. 5, "Notice to Employer of Claim for Injury" is to be filled out by the injured employe or his dependents and one copy served upon the employer and a copy mailed to the office of the Board within the time limits noted at the foot of the blank.

Form No. 5.

NOTICE TO EMPLOYER OF CLAIM FOR INJURY

Under Act No. 10 of Public Acts Extra Session 1912.

(Employers' Liability and Workmen's Compensation Law.)

To.....*Sherwood Motor Company*.....
(Write name of employer plainly on above line.)
.....*767-73 Water Street, Franklin, Michigan*.....
(Write address of employer plainly on above line.)

You will take notice that according to the provisions of Act No. 10 of Public Acts, Extra Session 1912.....*John K. Ledyard*.....hereby makes claim for compensation for injury received by.....*Him*.....while in your employ.

Name of employe.....*John K. Ledyard*.....

Postoffice address.....*503 Main Street, Franklin, Michigan*.....

The accident occurred the.....*4th*.....day of.....*May*.....*1916*, at.....*Franklin*....., Michigan.

The nature of the injury is as follows:

.....*Severe contusion of right foot—bones of second and third toes broken*.....

....Signature.....*JOHN K. LEDYARD*....

Address.....*503 Main Street, Franklin, Mich*.....

Dated at.....Franklin, Michigan....

this....*18th*....day of....*May*...,*1916*.

NOTE—This notice should be filled out by injured employe or some one in his behalf. In case of death of employe notice is to be filled out by dependents, or some person in their behalf. Notice of accident should be served on the employer within three months. Claim for compensation should be made within six months by delivering a copy of the above notice to employer personally or by registered mail.

FILL OUT IN DUPLICATE. HAND OR MAIL ONE COPY TO EMPLOYER, MAIL THE OTHER COPY TO THE INDUSTRIAL ACCIDENT BOARD, LANSING, MICHIGAN.

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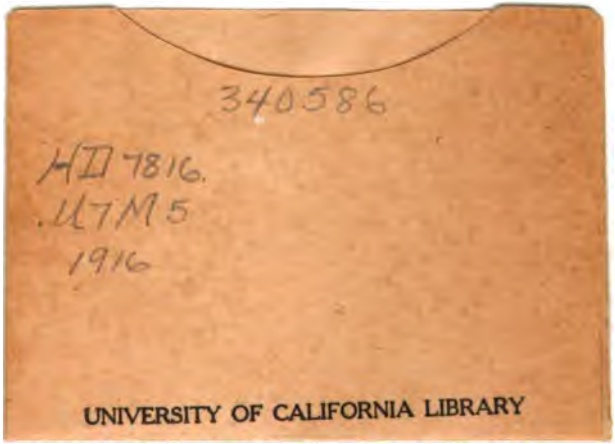

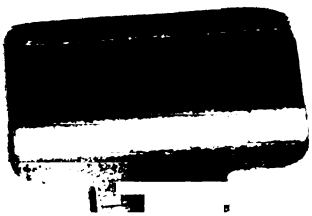

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